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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH D. RIGGIN, *et al.*,

Petitioners,

v.

OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that mandatory retirement is consistent with the laws of the United States in prohibiting age discrimination to employees of the United States Senate.

2. Whether the Court of Appeals erred in failing to remand this case to the United States Senate Committee on Ethics for consideration of the constitutional questions raised by Petitioners.

PARTIES TO THE PROCEEDING

The Petitioners are ten former members of the United States Capitol Police, formerly in the employ of the United States Senate. They are: Kenneth D. Riggin, Charles Farmer, Nicholas Garito, Sr., Edmund Goddard, William Hummer, James Kennedy, Frederick Schafer, James Snyder, Thomas Williams, and Robert F. Ansell.

The Respondents are the Office of Senate Fair Employment Practices and the Office of the Senate Sergeant at Arms. The Sergeant of Arms was an intervenor in the proceedings below.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

KENNETH D. RIGGIN, ET AL.,

Petitioners

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OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, ET AL.,

Respondents

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the Federal Circuit is reported at 61 F.3d 1563 and is reprinted in the Appendix at App. 1-20. The

Order and Opinion of the Select Committee on Ethics of the United States Senate entering a Final Decision is unreported and is reprinted in the Appendix at App. 21-28. The Opinion and Order of the Independent Hearing Board of the Office of Senate Fair Employment Practices of the United States Senate is unreported and is reprinted in the Appendix at App. 29-40.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on July 31, 1995. Jurisdiction in the Court of Appeals was based on 2 U.S.C. § 1209(a). No petition for rehearing was sought.

The jurisdiction of this Honorable Court to review the judgment of the Federal Circuit is based on 28 U.S.C. §§ 1254(1), 2350(a).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Government Employee Rights Act of 1991, App. 41-54; the Capitol Police Retirement Act, App. 54-57; and the Age Discrimination in Employment Act of 1967, App. 57-61.

STATEMENT OF THE CASE

Petitioners are ten former members of the Capitol Police Force. During their time of service, they were employees of the United States Senate, that portion of the Capitol Police Force being an agency of the Office of the United States Senate Sergeant At Arms. The Petitioners were involuntarily forced to retire at age 55. Their retirement was required by the terms of the Capitol Police

Retirement Act (CPRA), Pub. L. No. 101-428, § 2(b)(1)(A), 104 Stat. 928, 928 (1990) (codified as amended at 5 U.S.C. § 8335(d)).

After exhausting counseling and mediation, the Petitioners challenged their involuntary retirement before the Office of Fair Employment Practices of the United States Senate (Office). 2 U.S.C. § 1207(a). The Petitioners claimed, *inter alia*, that the forced retirement violated their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution and their rights to be free from any discrimination on the basis of age within the meaning of the Age Discrimination in Employment Act of 1967 (ADEA) as made applicable to federal employees. 29 U.S.C. § 633a. The right to be free from age discrimination under the ADEA is guaranteed to Senate employees by the Government Employee Rights Act of 1991 (GERA), part of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 302(2), 105 Stat. 1071, 1088 (1991) (codified at 2 U.S.C. § 1202(2)).

The Office convened a Hearing Board which held a hearing on Petitioners' claims. 2 U.S.C. § 1207(b). The Board granted the Sergeant At Arms' motion for summary judgment on the grounds that the Petitioners' forced retirement did not violate GERA's guarantees of freedom from age discrimination. The Board also held that it did not have jurisdiction to consider the Petitioners' constitutional claims. The Petitioners appealed this determination to the Select Committee on Ethics of the United States Senate, 2 U.S.C. § 1208(a), which affirmed the Board in a two sentence order devoid of any reasoning. 2 U.S.C. § 1208(d)(2)(A).

After receiving an adverse determination from the Senate Ethics Committee, the Petitioners brought their

claims to the United States Court of Appeals for the Federal Circuit. 2 U.S.C. § 1209(a). The Court of Appeals rejected the Petitioners' views that the mandatory retirement statute was inconsistent with the Senate's commitment to discrimination-free employment actions. *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1993). In particular, the court determined that the mandatory retirement statute was not affected by the adoption of the ADEA standards by the GERA. *Id.* at 1566-69. The court also found that the Senate Ethics Committee had jurisdiction to consider Petitioners' constitutional claims. *Id.* at 1569-71. However, instead of remanding the matter to the Committee for further consideration as Petitioners had suggested, the Court of Appeals decided the matter *sua sponte* and rejected the constitutional claims. *Id.* at 1571. The Court of Appeals also rejected Petitioners' claim that the Senate Ethics Committee's reasonless order violated their due process rights. *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN FINDING THAT MANDATORY RETIREMENT IS CONSISTENT WITH THE APPLICATION OF THE LAWS PROHIBITING AGE DISCRIMINATION TO EMPLOYEES OF THE UNITED STATES SENATE

In passing GERA, Congress applied several of the Civil Rights Laws to the employees of the Senate. Earlier this year, as part of the present Congressional majority's "Contract With America," Congress extended GERA's civil rights provisions to all Congressional employees (along

with a host of other laws not covered by GERA). *See* Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995) (Accountability Act). In reaching its decision in this case, the Court of Appeals has thwarted Congress' will on this important national policy.

In passing GERA and the Accountability Act, Congress gave Congressional employees the same employment rights enjoyed by all other American workers. From this principle, "there are no exemptions. There are no gaps. There are no loopholes. If you are a Senate employee, you are covered with the protections of these civil rights bills now on the books." 137 Cong. Rec. S15370-71 (daily ed. Oct. 29, 1991) (statement of Sen. Grassley). This universal coverage was a bipartisan feature of the GERA debate. *See* 137 Cong. Rec. S15371-72, 15378 (daily ed. Oct. 29, 1991) (statements of Sen. Mitchell); 137 Cong. Rec. S15379 (daily ed. Oct. 29, 1991) (statement of Sen. Metzenbaum); 137 Cong. Rec. S15376 (daily ed. Oct. 29, 1991) (statement of Sen. Rudman). Congress' plan for a seamless web of protection is also apparent in the Accountability Act which has an even more encompassing array of legal protections and which applies not only to all current congressional employees, but also all former employees of Congress as well. Accountability Act, Pub L. No. 104-1, § 101(4), 109 Stat. at 4.

As part of the GERA and the Accountability Act, Congress applied to itself section fifteen of the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 633a) which made the ADEA applicable to federal workers. 2 U.S.C. § 1202(2); Accountability Act, Pub. L. No. 104-1, §201(a)(2). Section 633a states that "All personnel actions affecting employees or applicants for employment who are at least 40 years of age ... shall be

made free from any discrimination based on age." 29 U.S.C. § 633a(a). The *only* exception to this rule is where "age is a bona fide occupational qualification [(BFOQ)] necessary to the performance of the duties of the position." 29 U.S.C. §633a(b).

This Court has long recognized that the analog provisions of the ADEA applicable to other employers, such as the states and localities, prohibits mandatory retirement schemes, even for law enforcement officials, unless they are a BFOQ. *See EEOC v. Wyoming*, 460 U.S. 226 (1983). In considering the mandatory retirement provision for federal firefighters (which is substantially the same as the CPRA), this Court found that the federal mandatory retirement statute, 5 U.S.C. § 8335, was not a BFOQ. *Johnson v. Mayor of Baltimore*, 472 U.S. 353 (1985).

The Court of Appeals in this case did not address the issue of whether the CPRA was a BFOQ consistent with ADEA as required by the statute. Instead it proceeded directly to the presumption that the CPRA was an exception to the ADEA. How it reached this conclusion is somewhat mysterious because the court failed to provide virtually any reason for its *ipse dixit* other than reference to dicta in two old, lower-court cases and a reference to the legislative history of an expired statutory provision. *Riggin*, 61 F.3d at 1567. This is all the more remarkable because this Court clearly indicated in *Johnson* that the federal mandatory retirement scheme was *not* an exception to the ADEA. *Johnson*, 472 U.S. at 366 n.10. In fact, this Court made it clear that it could not come to any conclusions about the compatibility of the federal mandatory retirement statute with the ADEA and thus left the question open for another day. *Id.* at 366, 369. This

case presents this Court with the opportunity to settle the issue left open in *Johnson*.

In resolving this matter, Petitioners note that just as this Court has come to the conclusion that age alone is not sufficiently predicative of job performance in law enforcement, *EEOC v. Wyoming, supra*, Congress has apparently come to the same belief. In response to the *EEOC v. Wyoming* decision, Congress passed an exemption from the ADEA for state and local law enforcement personnel which allowed compulsory retirement. *See* Age Discrimination in Employment Amendments of 1986, Pub. L No. 99-592, §3(a), 100 Stat. 3342, 3342 (1986). However, because Congress was not at all sure that the exception was truly compatible with its goal of eliminating age discrimination, it placed a sunset provision on the exception and ordered further study of the matter. *Id.*, §§ 3(b), 5(a), 100 Stat. at 3342, 3343. Congress must have decided that an exemption for mandatory retirement for law enforcement officers was not compatible with the ADEA because it let the exemption expire as scheduled in the original statute.

This chronology demonstrates first, that Congress knew that an exemption for mandatory retirement schemes was necessary for compatibility with the ADEA, and second, that Congress did not provide such an exemption for federal law enforcement personnel such as the Petitioners. Nonetheless, the Court of Appeals found that the mere existence of a federal retirement statute to be an exemption from the ADEA. This finding was made in the absence of any Congressional indication that such was intended and Congress' decision to let an actual exemption for state and local law enforcement officers expire. The Court of Appeals thus creates an ADEA dichotomy between local and federal law enforcement officers that would be, as

one commentator has noted, "a glaring inconsistency in [which]... there is an absence of logic." Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 St. John's L. Rev. 13, 20-21 (1993).

It is clear, as Petitioners have consistently contended, that the mandatory retirement provisions of the CPRA are incompatible with the specific remedial commandments of the ADEA, the GERA, and the Accountability Act. This Court should grant the Petition for *Certiorari* to decide the important national issues as to the compatibility of federal mandatory retirement laws with the ADEA left unresolved in *Johnson* and to vindicate the important national policies involved in eradicating unwarranted age discrimination in this country. This Court should also grant this Petition to resolve the intolerable tension created by the Court of Appeals' decision emasculating the GERA and the Accountability Act, two vital pieces of public policy and law which Congress have determined are at the heart of its responsibilities to its employees and to the American policy.

II.

THE COURT OF APPEALS ERRED IN FAILING TO REMAND THIS MATTER TO THE UNITED STATES SENATE FOR CONSIDERATION OF THE CONSTITUTIONAL QUESTIONS RAISED BY THE PETITIONERS.

In their complaint to the Senate Ethics Committee, the Petitioners asserted that their due process rights under the Fifth Amendment to the United States Constitution were violated by their involuntary retirement. Because the Hearing Board did not believe it had jurisdiction over such

a claim, it did not rule on the constitutional claim. In fact, because of its ruling, the precise nature of the due process claims were never developed. The Senate Ethics Committee affirmed this ruling. On review, the Court of Appeals correctly held that, as Petitioners urged, the Senate Ethics Committee did have jurisdiction to consider the due process contentions put forth by the Petitioners. However, the Court of Appeals then went on to decide the merits of the constitutional claim notwithstanding the fact that the Petitioners never identified the scope of their claims. The Court of Appeals committed a grave error when it took this additional step.

This case, like many of those to follow under the Accountability Act, was adjudicated in a new forum, a committee of Congress. There is no challenge in this Petition to that method of adjudication. Petitioners contend, however, that once the Court of Appeals determined that the Senate Ethics Committee should have considered their due process claims, it should have remanded the case to the Ethics Committee for further consideration.

The reason the Court of Appeals should have remanded this cause comes from considerations of constitutional comity. Congress is a separate, coordinate branch of the central government. First through GERA, and now through the Accountability Act, Congress has extended the benefits of the civil rights and labor laws to its employees. It has, however, reserved to itself, in part, the method for application of those laws to its employees. This can be appropriate because one of the prerogatives of each branch traditionally has been that each branch has authority to determine matters related its own internal governance without unnecessary interference from another branch. *Cf. Vander Jagt v. O'Neill*, 699 F. 2d 1166 (D.C. Cir.), *cert.*

denied, 464 U.S. 823 (1983); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). The courts, therefore, rightfully have been reluctant to intrude on Congress' prerogatives as an equal component of the federal triad. The Court of Appeals, however, trammeled this prerogative when it decided Petitioners' due process arguments without letting the Senate Ethics Committee consider those questions first.

The proper course to insure that the courts do not unnecessarily intrude on a coordinate branch of government is to remand this case to the Senate Ethics Committee in the first instance to examine the constitutional question. This is the only course consistent with the constitutional and congressional scheme that insures the prerogatives of Congress are not trampled.

The problems which arise from failing to defer in the first instance to the coordinate branch are evident in the instant case. The Court of Appeals decided the constitutional question without troubling itself to find out just what that question might be. Indeed, one would search in vain Petitioners' briefs in the court below for a hint of precise nature of their due process claim. Instead, the court simply chose from a menu of possible claims which the Respondents offered up. These were Respondents' best guesses on the matter since the Senate Ethics Committee mistakenly prevented the Petitioners from developing their due process claims.

When dealing with the internal practices and procedures of Congress, a court should not be free to guess at what constitutional principle might be involved. Such a rule ratchets tension between the branches to an intolerable level. The only acceptable solution in our system of

separated branches is to allow Congress to address the constitutional issue.

That Congress had a level of concern for the separation of powers problems involved in this case is manifest from the statutory scheme it chose. Congress could have assigned the adjudication of these cases entirely to the federal courts. It did not choose to do this. Rather, it reserved fact finding and initial determinations for itself. *See* 2 U.S.C. § § 1207-08. The reason for this is evident and the same reason the Court of Appeals erred in this case: Congress should have the first opportunity to govern its own practices and procedures. Anything less does violence to the separation of powers between the branches.

Ordinarily, a question concerning the prerogatives of another branch of the government might mean that the courts should abstain from exercising their jurisdiction at all as a form of nonjusticiable political question. *Cf. Metzenbaum v. FERC*, 675 F.2d 1282 (D.C. Cir. 1982). However, just as this Court has noted that the branches are not "hermetically" sealed from one another, *INS v. Chadha*, 462 U.S. 919, 951 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)), neither is total abstinence from the exercise of jurisdiction appropriate in this case.

Rather, the proper analogy is found in the doctrine this Court has fashioned for abstention in certain types of cases. In particular, the doctrine which this Court announced in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), provides the most instructive guidance for this case. Under *Pullman* abstention, federal courts will, in certain circumstances, defer ruling on a constitutional issue and remand the matter to a state court for a determination.

This Court has offered three prime rationales for *Pullman* abstention all of which are present in this case. First, the Court stated its desire too avoid "needless friction" with another part of the federal system, the states. *Pullman*, 312 U.S. at 500. Although the portion of the federal system involved is different, the need to avoid friction is just as imperative with a coordinate branch of government. Friction undoubtedly will be generated by the approach adopted by the Court of Appeals in this case. The federal courts should not be in the business of telling Congressional committees what constitutional arguments they are considering. More importantly, the courts should not decide those issues without giving Congress itself the opportunity to consider the issue. The best way to inadvertently intruding onto Congress' turf and avoiding the inevitable friction created by the Court of Appeals approach is by deferring to the system Congress has established in this case by allowing it to examine questions of its own governance first.

The second *Pullman* justification is to avoid erroneous interpretations of law or policy. *Pullman*, 312 U.S. at 499-501. This Court is undeniably the authoritative arbiter of the meaning of both federal constitutional and statutory law. However, when it comes to its internal operations, Congress ought to be given the first opportunity to enunciate what it meant. The Congress may be mistaken in its view, but the courts should allow Congress to clarify the situation. Abstention to the Congress allows that body to state its position in view of the constitutional claim. The federal courts may thereby avoid an erroneous view that Congress may not make or would need to correct.

The final *Pullman* abstention rationale is to avoid having the federal courts make unnecessary constitutional rulings. *Pullman*, 312 U.S. at 501. This consideration is

of paramount importance in this case as it is in the *Pullman* doctrine. After the fact finding necessary to decide the constitutional claim, the Senate Ethics Committee may need to rethink its entire approach to the case. More importantly, if Congress, through the efforts of the Petitioners, comes to see that its policies are not consistent with constitutional doctrine as stated by this Court, Congress has the power the ability to modify its law or policy to avoid the constitutional infirmity. Surely, Congress ought to have the first opportunity to examine and remedy its constitutional problems. Intervention by the courts may be necessary, but Congress should have a first chance to avoid the constitutional ruling.

There is another, highly important similarity with the *Pullman* doctrine in this case. Under *Pullman* abstention, federal jurisdiction is not forsaken. Rather, as this Court has stated on many occasions, it is jurisdiction deferred. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980); *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973). This is precisely the situation which the Petitioners assert should be applied in this case. The Senate Ethics Committee should have the first opportunity to address the constitutional arguments. The courts should still be an available forum after the Congress has considered the problem. This is also in line with the statutory scheme Congress established in the GERA and the Accountability Act where, as noted previously, Congress has reserved initial decision-making power for itself but has allowed *appeal* to an Article III tribunal.

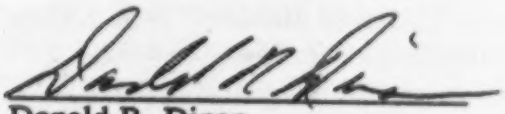
Petitioners assert that this case presents the intersection of political question and *Pullman* abstention law. It is appropriate for the Court to accept this case to review how these two doctrines interact in the modern

separation of powers context and whether the Court of Appeals erred in this case by not deferring to the Senate Ethics Committee in the first instance on the constitutional issues in this case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request this Honorable Court to grant the Petition for a Writ of *Certiorari* and review the decision of the United States Court of Appeals for the Federal Circuit in this case.

Respectfully submitted,



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October 30, 1995

APPENDIX

App. 1

United States Court of Appeals for the Federal Circuit

94-6004

KENNETH D. RIGGIN, CHARLES FARMER, NICHOLAS GARITO, SR., EDMUND GODDARD, WILLIAM HUMMER, JAMES KENNEDY, FREDRICK SCHAFER, JAMES SNYDER, THOMAS WILLIAMS, and ROBERT F. ANSELL,

Petitioners,

v.

OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES,

Respondent,

and

OFFICE OF THE SENATE SERGEANT AT ARMS,

Intervenor.

Donald R. Dinan, O'Connor & Hannan, of Washington, D.C., argued for petitioners. With him on the brief was James Fairbairn.

Claire M. Sylvia, Assistant Senate Legal Counsel, Office of Senate Fair Employment Practices, of Washington, D.C., argued for respondent. With her on the brief were Michael Davidson, Senate Legal Counsel, Ken U. Benjaminm Jr., Deputy Senate Legal Counsel and Morgan J. Frankel, Assistant Senate Legal Counsel.

Timothy W. Milett, Senate Assistant Counsel for Employment, Office of the Senate Sergeant At Arms, of Washington, D.C. argued for intervenor. With him on the brief were Jean M. Manning, Senate Chief Counsel for Employment and Roy A. Sheetz, Senate Assistant Counsel for Employment.

Appealed from: Office of the Senate Fair Employment

App. 3

United States Court of Appeals for the Federal Circuit

94-6004

KENNETH D. RIGGIN, CHARLES FARMER, NICHOLAS GARITO, SR., EDMUND GODDARD, WILLIAM HUMMER, JAMES KENNEDY, FREDRICK SCHAFER, JAMES SNYDER, THOMAS WILLIAMS, and ROBERT F. ANSELL,

Petitioners,

v.

OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES,

Respondent,

and

OFFICE OF THE SENATE SERGEANT AT ARMS,

Intervenor.

DECIDED: July 31, 1995

Before PLAGER, CLEVENGER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

Ten former members of the United States Capitol Police challenge the statutory provision requiring that Capitol Police officers retire upon reaching age 55. A hearing board of the Office of Senate Fair Employment Practices held that the statute in question was validly applied to the petitioners, and the Senate Select Committee on Ethics agreed. We affirm.

I

The Capitol Police Retirement Act (CPRA), as enacted in 1990, required members of the Capitol Police who were eligible for retirement to retire upon reaching age 55. The effective date of the Act was postponed for two years, so that in October 1992, any Capitol Police officer who was 55 or older and had 20 years of service was forced to retire unless the Capitol Police Board granted the officer a special exemption from automatic separation. 5 U.S.C. §§ 8335 (d), 8425(b) (1988 & Supp. II 1990). In 1994, the statute was amended to raise the mandatory retirement age to 57. 5 U.S.C. §§ 8335 (d), 8425(c) (1994).

Following the enactment of the CPRA, a group of Capitol Police officers who were on the Senate payroll and were faced with mandatory retirement filed complaints with the Office of Senate Fair Employment Practices protesting the application of the mandatory retirement provision to them. Their principal contention was that the prohibition

against age discrimination in the Government Employee Rights Act of 1991 (GERA), 2 U.S.C. § 1202 (2), effectively repealed the mandatory retirement provision of the CPRA.

A designated hearing board of the Office of Senate Fair Employment Practices denied relief. In its opinion, the board explained that Section 302 of the GERA, 2 U.S.C. § 1202, which gave the employees a statutory right to be free from age discrimination, did not override the mandatory retirement provisions of the CPRA. The board found no reason to suppose that Congress intended in 1991 to repeal by implication the mandatory retirement provisions of the CPRA, which were enacted only one year earlier.

The board noted that the complainants had also challenged the mandatory retirement provisions on due process grounds. The board concluded, however, that its jurisdiction was limited to determining whether an employee had suffered a violation within the meaning of Section 302 of the GERA, 2 U.S.C. § 1202, and did not extend to constitutional challenges to particular employment actions.

The Senate Select Committee on Ethics agreed with the board that "the CPRA was not repealed by, and does not violate, the Government Employee Rights Act of 1991." The Committee therefore affirmed the order of the hearing board, and the petitioners sought review in this court. See 2 U.S.C. § 1209(c).

II

The petitioners renew their claim that the mandatory retirement provisions of the CPRA were effectively repealed by the GERA, even though the latter statute is silent with

respect to its effect on the former. We agree with the hearing board that the GERA did not repeal the mandatory retirement provisions of the CPRA, and that the mandatory retirement provisions of the CPRA were therefore properly applied to the petitioners.

It is a familiar canon of statutory construction that repeals by implication are disfavored. Traynor v. Turnage, 485 U.S. 535, 547 (1988); Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); Morton v. Mancari, 417 U.S. 535, 549-50 (1974). When statutes appear to conflict, courts will endeavor to read them consistently and will not find a narrow statute "submerged by a later enacted statute covering a more generalized spectrum" unless the later statute "expressly contradict[s] the original act" or unless such a construction "is absolutely necessary" in order for the later statute to have any meaning at all. Radzanower, 426 U.S. at 153; see United States v. Fausto, 484 U.S. 439, 453 (1988) ("it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change").

The task of reconciling the two statutes at issue in this case is not a difficult one. Contrary to the petitioners' contention, the GERA is the more general statute and the CPRA is the more specific: the GERA extends employment discrimination statutes to Senate employees generally, while the mandatory retirement provisions of the CPRA speak to a specific employment issue as it affects a specific group of congressional employees. Thus, the mandatory retirement provisions of the CPRA simply establish a narrow exception to the general rule, set forth in the GERA, that Senate employees are protected against age discrimination in employment.

The Supreme Court's decision in Morton v. Mancari, provides a close analogy. In that case, the Supreme Court held that specific legislation requiring that Indians be given preference for employment with the Bureau of Indian Affairs was not implicitly repealed by the Equal Employment Opportunity Act of 1972. The Court found that the two statutes could readily co-exist, and that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment." 417 U.S. at 550-51.

As in Morton, an examination of the legislative background shows that there is no reason to suppose that Congress intended the general statute -- the age discrimination provision of the GERA -to repeal the earlier-enacted but more specific statute -- the mandatory retirement provisions of the CPRA. Beginning in the 1940s, Congress adopted a series of measures providing early retirement rights to federal law enforcement officers and firefighters. See Act of July 11, 1947, ch. 219, 61 Stat. 307 (FBI agents with 20 years of service permitted to retire at 50); Act of July 2, 1948, ch. 807, 62 Stat. 1221, 1221-22 (similar treatment provided for other federal law enforcement officers); Pub. L. No. 84-854, § 401, 70 Stat. 736, 749 (1956) (similar treatment for employees at federal correctional facilities); Pub. L. No. 92-382, 86 Stat. 539 (1972) (similar treatment for federal firefighters). In 1974, Congress chose to balance the early retirement options for executive branch law enforcement officers with a mandatory retirement provision requiring that such officers retire at age 55 if they have 20 years of service at that time. See Pub. L. No. 93- 350, § 4, 88 Stat. 355, 356 (1974) . The purpose underlying the mandatory retirement provisions was to ensure "the

maintenance of relatively young, vigorous, and effective law enforcement and firefighting workforces," a goal that the early retirement option by itself had not achieved. See H.R. Rep. No. 463, 93d Cong., 1st Sess. 2 (1973).

During the same year that it enacted the mandatory retirement provisions for law enforcement officers, Congress extended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, to federal executive branch employees. Pub. L. No. 93-259, 88 Stat. 55, 74-75 (1974). Four years later, Congress amended the ADEA to make mandatory retirement unlawful for most federal employees, while leaving the mandatory retirement statutes for federal law enforcement officers in effect. Pub. L. No. 95-256, § 5(c), 92 Stat. 189, 191 (1978). See generally Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353, 363-70 (1985) (ADEA co-exists with federal mandatory retirement provisions for law enforcement officers); Palmer v. Ticcione, 576 F.2d 459, 465 n.7 (2d Cir. 1978) (same), cert. denied, 440 U.S. 945 (1979); Bowman v. Department of Justice, 510 F. Supp. 1183, 1186 (E.D. Va. 1981) (same), aff'd, 679 F.2d 876 (4th Cir.), cert. denied, 459 U.S. 1072 (1982); H.R. Rep. No. 756, 99th Cong., 2d Sess. 6 (1986) (even after 1978 amendment to ADEA, separate mandatory retirement laws for federal law enforcement officers and firefighters remained in effect).

In 1990, Congress enacted the CPRA, which brought the retirement system for the Capitol Police into line with the retirement systems for other federal law enforcement agencies. The CPRA authorized members of the Capitol Police with 20 years of experience to retire at age 50; it increased the annuities payable to Capitol Police retirees; and it required members of the Capitol Police who were eligible

for retirement to retire at age 55, absent special circumstances. Pub. L. No. 101-428, 104 Stat. 928 (1990). Later that year, Congress raised the mandatory retirement age to 57 for other executive branch law enforcement officers, Pub. L. No. 101-509, § 409(a), 104 Stat. 1389, 1468 (1990), and four years later Congress amended the CPRA to adopt the same mandatory retirement age for members of the Capitol Police, Pub. L. No. 103- 283, § 307, 108 Stat. 1423, 1441-42 (1994). That amendment followed a 1992 amendment to the CPRA that corrected a technical error in the language of the statute. Pub. L. No. 102-378, §§ 2(60), 2(67), 106 Stat. 1346, 1354 (1992). The GERA was enacted in 1991, the year after the CPRA and before both the 1992 and 1994 CPRA amendments. The GERA extended various employment discrimination laws, including the prohibition against age discrimination in federal employment, to all employees of the Senate. See 2 U.S.C. § 1202(2). In early 1995, Congress enacted the Congressional Accountability Act, Pub. L. No. 104-1, 109 Stat. 3, which made a number of federal statutes, including the ADEA, applicable to the entire legislative branch. See , § 201 (b) (2), 109 Stat. 7. A savings clause, id. § 506(a) (l), 109 Stat. 42, ensured that claims under the GERA would not abate with the enactment of the Accountability Act and made the GERA the exclusive remedy for such claims that accrued before the effective date of the Accountability Act. Two points emerge from this survey of the legislative background. First, just as the ADEA does not conflict with or invalidate the mandatory retirement provisions applicable to other federal law enforcement officers, the GERA does not conflict with or invalidate the mandatory retirement provisions of the CPRA. The mandatory retirement scheme for the Capitol Police is identical to the mandatory retirement scheme for executive branch law enforcement officers, and the specific age

discrimination prohibition applicable to the two groups, 29 U.S.C. § 633a, is also the same. It would make no sense to hold that the mandatory retirement scheme for other law enforcement officers can co-exist with the federal age discrimination law, while the mandatory retirement scheme for the Capitol Police cannot.

The parallelism between the two sets of statutes is reinforced by 2 U.S.C. § 1207(i), the provision of the GERA directing that precedents under the employment discrimination laws should be used in construing the GERA. Because the mandatory retirement provisions for other federal law enforcement officers have been held compatible with the ADEA, application of the same precedents to the CPRA provides further support for the conclusion that the mandatory retirement provisions for the Capitol Police have not been repealed.

Second, any doubt that the mandatory retirement provisions of the CPRA survived the GERA is put to rest by the fact that after the enactment of the GERA, Congress twice amended the mandatory retirement provisions of the CPRA. In particular, the 1994 amendment, which raised the mandatory retirement age to 57, is flatly inconsistent with any suggestion that by enacting the GERA Congress intended to outlaw mandatory retirement for the Capitol Police. In addition, Congress in 1992 authorized lump-sum payments for accrued leave to be made to Capitol Police officers who were facing retirement as of the 1992 effective date of the CPRA's mandatory retirement provisions. See Pub. L. No. 102-397, § 202, 106 Stat. 1949, 1951 (1992). Congress would not have enacted such legislation if it had regarded the mandatory retirement program of the CPRA as repealed. It is thus clear from subsequent legislation that Congress viewed

the mandatory retirement provisions of the CPRA as having survived the GERA, just as the mandatory retirement provisions applicable to other federal law enforcement officers had survived the ADEA.

In arguing that the GERA effectively repealed the mandatory retirement provisions of the CPRA, the petitioners rely heavily on statements by several Senators that under the GERA all employees of the Senate would enjoy the same rights as other federal employees. See 137 Cong. Rec. 515,371-72 (daily ed. Oct. 29, 1991) (statement of Sen. Mitchell); id. at 515,379 (daily ed. Oct. 29, 1991) (statement of Sen. Metzenbaum); id. at 515,453 (daily ed. Oct. 30, 1991) (statement of Sen. Grassley). Those statements, however, were made in the context of a debate over whether the GERA should be applied to all Senate employees or only to non-legislative employees. The statements made in support of that view are not relevant to the question whether the GERA should be read to override the mandatory retirement provisions of the CPRA.

More compelling legislative evidence supports the opposite conclusion: that the GERA did not repeal the mandatory retirement provisions applicable to the Capitol Police. In 1992, for example, legislation was introduced to extend the effective date of the mandatory retirement provisions of the CPRA by three years. See H.R. 4910, 102d Cong., 2d Sess. In 1993, a House Committee report on a bill to amend the ADEA expressed the understanding that "the Capitol Police . . . and many other categories of Federal public safety personnel are subject to . . . mandatory retirement ages." H.R. Rep. No. 314, 103d Cong., 1st Sess. 3 (1993) . Finally, in 1994 efforts were made to repeal or block enforcement of the mandatory retirement provisions as

applied to the Capitol Police. Senator Metzenbaum introduced a bill to repeal the mandatory retirement provisions of the CPRA. See S. 1984, 103d Cong., 2d Sess. And Senator Jeffords sought to bar the use of funds to enforce the mandatory retirement provision with respect to the Capitol Police. Senator Jeffords noted at the time that the GERA had outlawed "age discrimination and mandatory retirement . . . for all congressional employees -- all congressional employees, that is, except the Capitol Police." 140 Cong. Rec. 57045 (daily ed. June 16, 1994). None of those efforts succeeded, but each evidenced an understanding that the mandatory retirement provisions of the CPRA were still in effect.

In sum, the legislative background and subsequent legislative action addressing the mandatory retirement provisions of the CPRA make it plain that Congress did not regard those provisions as repealed by the GERA. We therefore conclude that the CPRA and the GERA can and should be read compatibly, that Congress did not intend the GERA to repeal the CPRA, and that the petitioners are subject to the CPRA's mandatory retirement provisions.

III

The petitioners also contend that the hearing board should have entertained their constitutional challenge to the CPRA and that this court should remand the case to the hearing board with instructions to address that claim. The petitioners argue that the mandatory retirement provisions of the CPRA violate the equal protection component of the Due Process Clause of the Fifth Amendment. The hearing board regarded that constitutional question as outside its jurisdiction and refused to address it.

A

The hearing board reasoned that (1) Section 307(g) of the GERA, 2 U.S.C. § 1207(g), authorizes hearing boards to determine whether a violation of the Act has occurred; (2) Section 301(c) (3) of the Act, 2 U.S.C. § 1201(c) (3), defines a "violation" as a practice that violates Section 302 of the Act; and (3) Section 302 provides that personnel actions shall be free from discrimination based on age, within the meaning of Section 15 of the ADEA, 29 U.S.C. § 633a. The GERA, the board observed, does not define a violation to include conduct that is contrary to constitutional provisions.

The hearing board's analysis was correct as far as it went, but we believe the hearing board was too quick to disclaim jurisdiction over the petitioners' constitutional challenge to the CPRA. While it is' true that the board's statutory grant of authority is limited to determining whether a claimant has suffered a violation of one of the employment discrimination statutes listed in Section 302 of the GERA, the petitioners' constitutional challenge to the CPRA bears directly on whether they have a valid statutory discrimination claim. It is the mandatory retirement provisions of the CPRA that defeat the petitioners' claim under the age discrimination provision of Section 302 of the GERA. If the mandatory retirement provisions of the CPRA are invalid, whether for constitutional reasons or otherwise, the petitioners would likely have a viable statutory age discrimination claim. Accordingly, `the petitioners' constitutional challenge to the CPRA was within the jurisdiction of the hearing board, not because the hearing board has a special commission to decide constitutional issues but because the constitutionality of the CPRA bears directly on the question that the hearing board

clearly has jurisdiction to decide: whether the petitioners' rights under Section 302 of the GERA have been violated.

In support of the hearing board's disclaimer of jurisdiction over the constitutional issue, the respondent cites the general rule that administrative agencies do not have jurisdiction to decide the constitutionality of congressional enactments. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robison, 415 U.S. 361, 368 (1974); Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958); Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233, 242 (1968) (Harlan, J., concurring). That rule, however, "is not mandatory," but is subject to Congress's allocation of adjudicative responsibility. Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 780 (1994) . A finding that the agency lacks jurisdiction to decide constitutional questions is especially likely when the constitutional claim asks the agency to act contrary to its statutory charter, see Weinberger v. Salfi, supra; Johnson v. Robison, 415 U.S. at 367; Public Utilities Comm'n v. United States, supra, or when the consequence of committing the issue to the agency would be to deny judicial review of the constitutional claim, see Califano v. Sanders, 430 U.S. 99, 109 (1977); Johnson v. Robison, 415 U.S. at 368-69. In this case, the constitutional issue does not require the agency to question its own statutory authority or to disregard any instructions Congress has given it. Rather, the constitutional question is presented as part of the petitioners' claim of entitlement to the statutory relief that the hearing board is authorized to grant them. And permitting the hearing board to address constitutional claims that arise in the course of the board's performance of its statutory duties does not foreclose subsequent judicial review of those claims.

We think it clear that, in deciding whether an employee is entitled to relief under Section 302 of the GERA, the hearing board would be entitled to address questions such as whether the First Amendment or the Speech or Debate Clause provides a complete defense to a particular claim of employment discrimination. The fact that those defenses are constitutionally based would not disable the board from fulfilling its responsibility to decide the statutory claim presented to it. See Thunder Basin Coal Co. v. Reich, 114 S. Ct. at 780 (Federal Mine Safety and Health Review Commission addresses due process claims); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (NLRB addresses First Amendment objection to exercise of its statutory jurisdiction); Note; The Authority of Administrative Agencies To Consider the Constitutionality of Statutes, 90 Harv. L. Rev. 1682, 1687-88 (1977). The same principle applies here. Because addressing the constitutional challenge to the mandatory retirement provisions of the CPRA is consistent with, rather than contrary to, the board's congressionally conferred authority to decide statutory age discrimination claims, it is fair to infer that Congress did not intend to deny the board the authority to address constitutional issues.

We are fortified in our view of the hearing board's jurisdiction (and ultimately this court's jurisdiction) over the petitioners' constitutional claim by three distinctive features of the GERA. First, Congress made quite clear in enacting the GERA that it wanted all questions arising from employment discrimination claims under the GERA to be subject to judicial review. The judicial review provisions of the GERA were the product of a compromise between those who believed that Senate employees should be given the complete rights to district court litigation enjoyed by executive branch

employees and those who opposed any judicial review at all. The compromise position, which ultimately prevailed, provided for judicial review only at the appellate court level, but ensured that this court would have jurisdiction to address "all relevant issues of law" arising from the underlying claim and to "interpret constitutional and statutory provisions." 2 U.S.C. § 1209(c); see 137 Cong. Rec. 515,371 (daily ed. Oct. 29, 1991) (statement of Sen. Grassley) ; id. at 515,372-73 (statement of Sen. Mitchell) (standard of review by Federal Circuit similar to that ordinarily applicable under the Administrative Procedure Act); 137 Cong. Rec. 515,453 (daily ed. Oct. 30, 1991) (statement of Sen. Hatch); id. (statement of Sen. Grassley). The grant of authority to this court to address constitutional questions when reviewing final decisions under the GERA suggests that the hearing board was intended to have the authority to address those issues in the first instance.

Second, the GERA provided that Senate employees could not "commence a judicial proceeding" to redress the practices prohibited by Section 302 except as provided by the GERA itself. 2 U.S.C. § 1216. That statutory provision signifies that Congress did not intend to permit federal district courts to address questions that might fall outside the jurisdiction of the hearing board and this court on review. Because there is a strong presumption that constitutional claims are judicially reviewable in some forum, see Webster v. Doe, 486 U.S. 592, 603 (1988); Davis v. Passman, 442 U.S. 228, 242 (1979), GERA's restriction of judicial review to this court suggests that Congress intended constitutional claims arising in the course of GERA proceedings to be within the competence of the hearing board and of this court on review.

Finally, it is important to note that the GERA does not provide for direct review of the hearing board by this court, but interposes the Senate Select Committee on Ethics as the ultimate congressional arbiter of GERA claims, through its statutory responsibility to review hearing board decisions. 2 U.S.C. § 1208. Whatever reluctance Congress might have to commit constitutional questions to an ordinary administrative agency would not appear to extend to a body such as a hearing board that is functioning under the direct supervision of a Senate Committee. Should the hearing board engage in constitutional adventurism, the Ethics Committee would be able to ensure prompt correction of the board's error. We therefore conclude that Congress did not intend, through the GERA, to deprive the hearing board, the Ethics Committee, and this court of jurisdiction to address constitutional questions that may arise incident to the resolution of a claim arising under Section 302 of the GERA.

B

Although we believe the board should have addressed the petitioners' constitutional claim, its failure to do so does not require a remand. The issue is purely a question of law, and it is within this court's jurisdiction, in reviewing GERA appeals, to "decide all relevant questions of law and interpret constitutional and statutory provisions." Moreover, the issue is a straight forward and simple one that would not justify the time and effort involved in a remand.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), the Supreme Court upheld, against an equal protection challenge, a state statute requiring police officers to retire at age 50. There is no plausible basis for distinguishing this case from Murgia, or from the Supreme

Court's subsequent decision in Vance v. Bradley, 440 U.S. 93 (1979), in which the Court rejected an equal protection challenge to a mandatory retirement statute applicable to foreign service officers. The petitioners' challenge to the mandatory retirement provisions of the CPRA claim based on the equal protection component of the Due Process Clause is therefore without merit.

C

In their brief, the petitioners raise a second constitutional claim -- that the Ethics Committee violated the petitioners' right to due process by not providing a sufficiently detailed written statement of its reasons for upholding the hearing board's decision. The short answer to this claim is that the Committee provided a written statement for its action that was adequate to satisfy any requirements imposed by the GERA, see 2 U.S.C. § 1208(e), the Committee's own rules, see Ethics Committee Interim Procedures Rule 4.3, 138 Cong. Rec. 517,065 (daily ed.), or the Due Process Clause, see Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Harris v. Rivera, 454 U.S. 339, 344 (1981) (occasions on which due process requires an explanation of the reasons for a decision "are the exception rather than the rule"). Although the "decision" portion of the Committee's opinion was short, it was sufficient to explain the reasons for the Committee's action, particularly in light of the thorough opinion prepared by the hearing board and the purely legal nature of the issue in dispute.

AFFIRMED.

United States Court of Appeals for the Federal Circuit

94-6004

KENNETH D. RIGGIN, CHARLES FARMER, NICHOLAS GARITO, SR., EDMUND GODDARD, WILLIAM HUMMER, JAMES KENNEDY, FREDRICK SCHAFER, JAMES SNYDER, THOMAS WILLIAMS, and ROBERT F. ANSELL,

Petitioners,

v.

OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES,

Respondent,

and

OFFICE OF THE SENATE SERGEANT AT ARMS,

Intervenor.

Judgment

	Office of Senate Fair Employment Practices
ON APPEAL from the	
in CASE NO(S)	93-048, 93-003, 93-019, 93-005, 93-043, 93-047, 93-008, 93-015, 93-

017, 93-004,
93-040, 93-045, 93-046, and
93-006

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED JUL 31 1995

Francis X. Ginghart, Clerk

ISSUED AS A MANDATE: SEP 20 1995

May 5, 1994

Donald Dinan
O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Jean Manning
Office of Senate Legal Counsel
Employee Management Relations
SH-143
Washington, D.C. 20510

In The Matter Of

Harold E. Fitzgerald, Charles Farmer, Nicholas Garito, Sr., Edmund Goddard, William Hummer, James Kennedy, Fredrick Schafer, James Snyder, Thomas Villarial, Thomas Williams, Jimmie Young, Raymond Wilson, Kenneth D. Riggin, and Robert F. Ansell and
The U. S. Senate Sergeant At Arms
(Capitol Police)
Docket Nos. SFEP 93-048, SFEP 93-015, SFEP 93-003, SFEP 93-017, SFEP 93019, SFEP 93-004, SFEP 93-005, SFEP 93-040, SFEP 93-043, SFEP 93-045, SFEP 93-047, SFEP 93-046, SFEP 93-008, SFEP 93-006

VACATING ENTRY OF FINAL DECISION
AND
ENTRY OF FINAL DECISION

On April 28, 1994, the Senate Select Committee on Ethics executed a decision in the matter of *Riggin v. The U. S. Senate Sergeant At Arms (Capitol Police)*, Docket No. SFEP 93-008. The caption of this case and the decision itself made reference only to the appeal of one of the fourteen individuals who originally requested review by the Committee. On April 29, 1994, the decision was entered in the records of the Office as a Final Decision.

On the 2nd day of May 1994, the Committee issued a "Substitute Caption" in this matter, a copy of which is enclosed. The substitute caption reflected the names and docket numbers for the fourteen employees, who originally sought review by the Committee. Pursuant to Committee's instructions by letter dated May 4, a copy of which is enclosed, the entry of a final decision in the records of this Office on April 29, 1994, is hereby vacated and the Committee's decision of April 28, 1994 is hereby entered in the Office records as a final decision with the following caption:

In The Matter Of

Harold E. Fitzgerald, Charles Farmer, Nicholas Garito, Sr., Edmund Goddard, William Hummer, James Kennedy, Fredrick Schafer, James Snyder, Thomas Villarial, Thomas Williams, Jimmie Young, Raymond Wilson, Kenneth D. Riggin, and Robert F. Ansell
and
The U. S. Senate Sergeant At Arms
(Capitol Police)
Docket Nos. SFEP 93-048, SFEP 93-015, SFEP 93-003, SFEP 93-017, SFEP 93019, SFEP 93-004, SFEP 93-005, SFEP 93-040, SFEP 93-043,

SFEP 93-047, SFEP 93-046, SFEP 93-008,
SFEP 93-006

Accordingly, please find enclosed a copy of the Committee's decision of April 28, 1994, with the accompanying "Notice Of Appeal Rights."

Harriett G. Jenkins

Enclosures

cc: Victor Baird
Raig Ellian
James Fairbairn
Robert Ansell
Kathryn Rapp

United States Senate
Select Committee on Ethics
Hart Senate Office Building, Room 220
Second and Constitution Avenue, N.E.
Washington, D.C. 20510-6425
Telephone (202) 224-2981

1994 May 3

Dr. Harriett Jenkins
Director
Office of Senate Fair Employment Practices
United States Senate
Washington, D.C. 20510

Dear Dr. Jenkins:

Enclosed please find a substitute caption in the matter of Riggin et al. and The U.S. Senate Sergeant At Arms.

Sincerely,

Victor Baird
Staff Director
and Chief Counsel

cc. Donald R. Dinan
Haig Ellian
Jean Manning
James Fairbairn
Robed Ansell
Kathryn Rapp

SENATE SELECT COMMITTEE ON ETHICS

IN RE: Harold E. Fitzgerald, Charlers Farmer, Nicolas Garito, Sr., Edmund Goddard, William Hummer, James Kennedy, Fredrick Schafer, James Snyder, Thomas Villarial, Thomas Williams, Jimmie Young, Raymond Wilson, Kenneth D. Riggin, and Robert Ansell and The U.S. Sergeant At Arms (Capitol Police)

OSFEP CASE NOS: SFEP 93-048, SFEP 93-015, SFEP 93-003, SFEP 93-017, SFEP 93-019, SFEP 93-004, SFEP 93-005, SFEP 93-040, SFEP 93-043, SFEP 93-045, SFEP 93-047, SFEP 93-046, SFEP 93-008, SFEP 93-006

United States Senate
Select Committee on Ethics
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Washington, D.C. 20510-6425
Telephone (202) 224-2981

Dr. Harriett Jenkins
Director
Office of Senate Fair Employment Practices
United States Senate
Washington, D.C. 20510

Dear Dr. Jenkins:

On May 2, 1994, the Committee transmitted to the Office a substitute caption for the Committee's decision of April 28, 1994, in the matter of Kenneth Riggin, et al. and the U.S. Senate Sergeant At Arms. This substitute caption was intended to make clear that the Committee's April 28, 1994, decision applies to all parties who appealed to the Committee. Therefore, the Office is directed to vacate the entry of the decision with the original caption and to enter as the final decision the Committee's April 28, 1994, decision with the substitute caption.

Sincerely,
Victor Baird
Staff Director
and Chief Counsel

cc. Donald R. Dinan
Haig Ellian
Jean Manning
James Fairbairn
Robert Ansell
Kathryn Rapp

SENATE SELECT COMMITTEE ON ETHICS

IN RE: Kenneth D. Riggin v. Office of the U.S. Sergeant At Arms (Capitol Police)

OSFEP CASE NO: SFEP 93-008

INTRODUCTION

This matter comes to the Senate Select Committee on Ethics (Committee) on the appeal of Kenneth Riggin from the Opinion and Order of the Hearing Board of the Office of Senate Fair Employment Practices ("Hearing Board" or "OSFEP"), issued on or about December 23, 1993. Mr. Riggin ("Petitioner") challenges his forced retirement at age 55 from the U.S. Capitol Police force pursuant to the mandatory separation provision of the Capitol Police Retirement Act ("CPRA"), 5 U.S.C. 8335(d), enacted in 1990. Mr. Riggin asserts that the Government Employees Rights Act of 1991 repealed the mandatory separation provision of the CPRA (and also argues that the Hearing Board had jurisdiction to CPRA (and also argues that the Hearing Board had jurisdiction to hear his due process claim of age discrimination). Petitioner appeals the Hearing Board's Order, wherein-in the Board granted the employer's Motion for Summary Judgment on the grounds that the CPRA was not repealed by, and does not violate, the Government Employees Rights Act of 1991 (and also ruled that it did not have jurisdiction to address the petitioner's claim of due process).

DECISION

The Committee concludes that the CPRA was not repealed by and does not violate, the Government Emp1oyees Rights Act of 1991. For these reasons, the Committee affirms the Order of the Hearing Board in the above-captioned matter on the basis of the record before it.

WHEREFORE, the Committee transmits this DECISION to the Office of the Senate Fair Employment Practices on April 28, 1994.

Richard Bryan
Chairman

Mitch McConnell
Vice Chairman

INDEPENDENT HEARING BOARD
OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES
UNITED STATES SENATE
WASHINGTON, D.C. 20510

FITZGERALD, et al.	)
COMPLAINANTS	) CASE NO.s
	)
v.	)
	) SEEP 93-048,
	) SFEP 93-015,
	) SEEP 93-003,
	) SFEP 93-017,
	) SFEP-93-019,
	) SFEP 93-004,
	) SPEP-93-005,
	) SFEP 93-040,
OFFICE OF THE U.S. SENATE	) SEEP 93-043,
SERGEANT AT ARMS	) SFEP 93-045,
	) SEEP 93-047,
RESPONDENT	) SFEP 93-046,
	) SFEP 93-008,
	) SFEP-93-006
	)

OPINION AND ORDER

Complainants, all but one of whom is a former capitol police officer, challenge their forced retirement from the Capital Police Force, an agency of the Office of U.S. Senate Sergeant at Arms. They contend that their forced retirement at age 55 violates the Government Employees Rights Act of

1991's (hereinafter GERA) prohibition against age discrimination.

Respondents are seeking summary judgment claiming that: 1) Complainants' claim is time barred because Complainants failed to timely seek redress; and 2) there was no violation of GERA. For reasons explained below this hearing board grants Respondent's motion on its second claim.

Summary Judgment Standards

Summary judgment is appropriate only when the moving party demonstrates that no genuine issue of material fact exists and that accordingly it is entitled to judgment as a matter of law. The moving party bears the burden of clearly establishing the absence of a triable fact issue. Celotex Corp. v. Catrett, 477 US. 317 (1986) Furthermore, in evaluating the summary judgment motion, facts must be read in a light most favorable to the non-moving party. Dale v. Chicago Tribune Co., 797 F.2d 458, 460 (7th Cir. 1986), cert. denied, 107 S.Ct. 954, (1987) A genuine issue for trial exists only when there is sufficient evidence favoring the non-movant for a bury to return a verdict for that party. Valley Liquors, Inc. v. Renfield Importers Ltd., 822 F.2d 656, 659 (7th Cir. 1987) In considering the evidence, all justifiable inference must be drawn in favor of the non-moveant. Id.

ISSUE: TIMELINESS OF CLAIMS

The mandatory retirement requirements which Complainants challenge came about in 1990 with Congress passage of the Capital Retirement Act (hereinafter CPRA). CPRA amended 5 U.S.C. Section 8335(b) to include the

Capital Police. This amendment required that Capital police officers retire upon reaching the age of 55 and completing 20 years of service. CPRA provided a limited exception, allowing the Capital Police Board when in its Judgment the public interest so requires may exempt [an officer] from automatic separation until that [officer] becomes 60 years of age."

In 1991 Congress passed GERA. Section 302 of GERA established the right of Senate and other congressional employees to be free of age discrimination, "within the meaning of Section 15 of the Age Discrimination and Employment Act of 1967 (29 U.S.C. 633 (a)". Under GERA, Complainants must initiate a request for within 180 days after alleged violation forming the basis the request. 2 U.S.C. Section 1205(a). GERA provided this limitation to be effective with the establishment of the Office of Senate Fair Employment Practices. The Office of Senate Fair Employment Practices was operational and first able to accept complaints as of June 1992.

Via Special Order 91.08 the Chief of the Capital Police notified members of the force of the passage of CPRA. This order summarized CPR-A provisions and notified employees that they would be forced to retire at age 55 and having achieved 20 years of service. As of June 10, 1992 all Complainants acknowledge having received written notification of the provisions of special Order 91.08.

Respondent contends that because Complainants did not initiate counseling under GERA until April and May 1993, which were substantially more than 180 days after they had received notice of the provisions in effect of CPRA, their claim is time barred. Respondent correctly cites Supreme

Court rulings that the statute of limitations commences in employment discrimination cases on the date the employee is notified of the employment decision and not on the date employment actually is effected. Chardon v. Fernandez, 454 U.S. 6 (1991), and Delaware State College v. Ricks, 449 U.S. 250 (1990)

Complainants' response in essence is that equitable considerations should toll the period for which Complainants were required to initiate counseling. Complainants point out that upon learning that they would be forced out under CPRA they challenged the mandatory retirement scheme through petitions, newspaper articles, letters to members of Congress and the Senate and through a public demonstration on the Capitol steps. Complainants argued that at no time during their objections to the forced retirement did the employer notify them of their right to file a complaint with the Senate Office of Fair Employment Practices.

The charge filing statue is not a jurisdictional prerequisite but rather a statute of limitations which is subject to equitable tolling. Zipes v. Transworld Airlines, Inc. 455 U.S. 385, 393. The equitable tolling doctrine does not require that the plaintiff show any misconduct on the part of the defendant. Baxter v. Healthcare Corp., 920 F. 2d 446, 452 (7th Cir. 1990), cert denied, 111 S.Ct. 2916. Equitable tolling "often focuses on the plaintiffs excusable ignorance of the limitations period and on the lack of prejudice to the defendant." Mull v. Arco Durethene Plastics, 784 F. 2d 284, 291 (7th Cir. 1986) quoting Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981)

Circuit courts which considered the question are virtually unanimous in holding that the ADEA filing period is

subject to equitable modification. Dillman v. Combustion Engineering Corp. 784 F.2d 57, 59 (2d Cir. 1986); McClinton v. Alabama By Products Corp., 743 F.2d 1483, 1485 (11th Cir. 1984); Vance v. Whirlpool Corp., 716 F.2d 1010, 1012 (4th Cir. 1983), cert. denied, 465 U.S. 1102 (1984); Coke v. General Adjustment Bureau, Inc. 640 F.2d 584, 594-95 (5th Cir. 1981) (en banc); Nielsen v. Western Electric Co., Inc. 603 F.2 741, 743 (8th Cir. 1979); Naton v. Bank of California, 649 F.2d 691, 695-96 (9th Cir. 1981; Wright v. State of Tennessee, 628 F.2d 949, 952-53 (6th Cir. 1980) (en banc); Bonham v. Dresser Industries, Inc., 569 F.2d 187, 193 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978); Kephart v. Institute of Gas Technology, 581 F.2d at 1287, 1288-69 (7th Cir. 1978); and Dartt v. Shell Oil Co., 539 F.2d at 1259-60. One commonly asserted basis for seeking equitable tolling is the complainant's "excusable ignorance" of his statutory rights where such ignorance may be attributable to the employer's failure to conspicuously post the required ADEA notice. Kephart, 581 F. 2nd at 1289; Bonham, 569 F.2d at 193; Cano v. United States Postal Service, 755 F.2d 222-23 (1st Cir. 1985) Courts often cite five equitable factors that should be weighed when considering whether to allow equitable tolling in a given case. These factors are: 1) "lack of actual notice of filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988); Wright, 628 F.2d at 593; Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244,' 1247 (S.D. OH. 1984) appeal dismissed, 770 F.2d L65 (6th Cir. 1985); Hay v. Wells Cargo, Inc., 596 F. Supp. 635, 638 (D.C. Nev. 1984), aff'd 796 F.2d 478 (10th Cir. 1986).

Given the facts that GERA was new and that Complainants assert; 1) lack of knowledge of the filing requirements under GERA; 2) lack of notice from Respondents about their right to file under GERA; 3) their diligent pursuit of their claims in other forums; and 4) the unlikely prejudice to Respondents since Respondents were notified of Complainants' challenges, Complainants have raised a viable claim for equitable tolling. Therefore summary judgment is denied Respondent on the issue of Complainants untimeliness in initiating an action under GERA.

ISSUE: WHETHER CPRA VIOLATES GERA

Respondent maintains that since CPRA does not violate GERA, Complainants cannot maintain their claim. Complainants respond that Senate employees' age discrimination claims must be processed under GERA and in turn those claims must be analyzed and adjudicated under the Age Discrimination and Employment Act.

There is an apparent, but not necessarily actual, conflict in GERA and CPRA. GERA establishes the right of employees to be free of age discrimination within the meaning of Section 15 of the ADEA. The ADEA clearly prohibits arbitrary discrimination in the work place based on age. Lorillard v. Pans, 434 U.S. 575, 577 (1978) In contrast CPRA mandates retirement at age 55 or age 60 at the latest, for employees with 20 years of service.

When faced with apparently conflicting statutes our first task is to determine whether they may be reconciled. United States v. Wills, 449 U.S. 200, 221-22 (1990). One consideration is whether CPRA requirements may be read in

a manner so as not to violate the ADEA. The ADEA has two provisions, either of which if applicable to CPRA, would enable the harmonious reading of both statutes.

One ADEA provision, Section 623(j), authorizes state and local subdivisions for the period January 1, 1987 through December 31, 1993 to retire law enforcement officers pursuant to a bona fide retirement plan which was in effect as of March 3, 1983. This provision is inapplicable to CPRA. There is no indication that this exemption applies to federal employees. Had Congress so intended it to apply, clearly Congress would have so stated when it extended the ADEA to eliminate the mandatory retirement requirement for federal employees in 1978.

A second ADEA provision to consider is Sec. 623(f)(1) which permits actions where age is shown to be a bona fide occupational qualification (BFOQ). Under the ADEA it is an unlawful employment practice for an employer to discharge an individual because of such individual's age except when age is shown to be a BFOQ. The issue is if in passing CPRA Congress established age for Capitol Police Officers as a BFQQ within the meaning of the ADEA. If so, this readily reconciles these statutes.

Determining whether CPRA's mandatory retirement reflects a Congressional determination that age 55 is a BFOO is made somewhat easier by related findings of the Supreme Court in Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985). In that case Baltimore City argued that 5 U.S.C. 8335(b) was not solely a federal retirement provision unrelated to the ADEA, but in fact established age as a BFOQ for fire-fighters. The Supreme Court reviewed

the history of this mandatory retirement provision and found otherwise. The Court stated:

> The history of this civil service provision, however, makes it clear that the decision to retire certain federal employees at an early age was not based on bona fide occupational qualifications for the covered employment.

The Supreme Court further noted that almost four decades of legislative history established that Congress at no time indicated that federal retirement age is based on a determination that age 55 is a bona fide occupational qualification within the meaning of the ADEA. The Court observed that the absence of any indication that Congress established the age limit based on the demands of the occupation raises the possibility that the federal rule is merely "an example of the sort of age stereotyping without factual bases that was one of the primary targets of the ADEA". The fact that a primary reason for the passage of CPRA is to maintain a fit and vigorous work force" without consideration of individual physical capabilities, supports this conclusion.

In sum, CPRA' s mandatory retirement provisions cannot be reconciled with the ADEA through consideration of specific ADEA provisions. Had CPRA been a plan adopted by any private employer for its police or security officers or adopted after 1983 for state or local law enforcement officers, this Board would have no problem in concluding that CPRA violates the ADEA.

We thus face actual conflicting statues - one general and the other specific, both covering the same subject - which cannot be made harmonious through specific statutory

provisions. We must now decide whether the latter passed GERA actually or implicitly repealed CPRA. Examination of the ADEA's legislative history is instructive.

Since enacting the ADEA in 1967 Congress has amended it several times. The ADEA originally did not apply to federal employees. In 1974 Congress extended coverage to federal employees. The 1978 amendments eliminated substantially all federal age limits on employment but left untouched several mandatory retirement provisions of the federal civil service statute applicable to specific federal occupations, including law enforcement officers. Among the provisions that the 1978 amendments left unaffected is 5 U.S.C. Section 8335(b). This provision requires certain federal law enforcement officers to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment. Johnson, 472 U.S. 353 (1985) citing Pub. L. 95-256, Sec. 5(c), 92 Stat. 191; and H.R. Conf. Rep. No. 95-950, pp. 10-11 (1978), Legislative History 521-522.

Thus, the ADEA is not a clear and manifest repeal of the CPRA. The ADEA's general provisions do not force the repeal of the specific unambiquous statutory requirement of 5 U.S.C. Section 8335.

Likewise, neither the statutory history nor the rules of statutory interpretation support Complainants' contention that through the latter passed GERA Congress implicitly intended to repeal CPRA. No inference of deal can be drawn from the ADEA's legislative history reported above. While Congress expressly repealed other statutes when enacting the ADEA, it left a mandatory retirement requirements, for federal police

officers in effect. The legislative history provides a strong presumption that 5 U.S.C. 8335(b) remains valid.

A standard principle of statutory construction is that a later statute will not be held to have implicitly repealed an earlier statute unless there is a clear repugnancy between the two. United States v. Fausto, 484 U.S. 439 (1988). A simple lack of harmony between the statutes will not suffice. The intention of the legislature to repeal must be clear and manifest. United States v. Borden Co., 308 U.S. 188, 198 (1939).

Although GERA and CPRA are at odds, both may remain in effect without grievously damaging the other. Congress has exempted other retirement schemes from the ADEA's prohibition against terminations based solely on age. Such limited exemptions, although otherwise objectionable under the ADEA, have not greatly harmed the ADEA and therefore cannot be said to be clearly repugnant to it. Moreover, allowing CPRA to serve as an exception to the ADEA's age discrimination ban enables both statutes to survive. When two statutes conflict to some degree they should be read together to give effect to each if that can be done without damage to their sense and purpose. Watt v. Alaska, 451 U.S. 259, 269 (1991).

Our approach of allowing a narrow exception to the ADEA is consistent with the approach federal courts have followed when considering other statutes which conflict with ADEA requirements. For example, in Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982) the Court held that a maximum entry age of 35 for federal correctional facility officers adopted in accordance with 5 U.S.C. Sec. 3307(d), constituted an exception to the ADEA. In Muller v. Lujan,

928 F.2d 207 (6th Cir. 1991), the plaintiff contended that s U.S.C. Sec. 559 which denies severance pay to involuntarily separated federal employees who qualify for an annuity violated the ADEA since only persons over age 40 would thereby be denied severance pay. The Sixth Circuit held that the ADEA did not explicitly nor implicitly repeal this severance pay statutory provision.

ISSUE: CONSTITUTIONAL CLAIMS

Complainants maintain that CPRA violates their right to due process. Respondent counters that the mandatory retirement statute for federal employees must be upheld if it meets the constitutional standards of addressing "a legitimate government interest" and is "rationally related to the achievement of that interest." This Board lacks the authority to address the parties' due process challenges and arguments.

More specifically, the Board's authority is derived from GERA. 2 U.S.C. Sections 307(b) and (g) of GERA authorize the Board to consider formal complaints brought under GERA and to issue "a determination as to whether a violation has occurred." At 2 U.S.C. 1201(c)(3) GERA states: "The term 'violation' means a practice that violates section 302 of this title." Section 302 prohibits discrimination within the meaning of section 717 of the 1964 Civil Rights Act, section 15 of the Age Discrimination in Employment Act of 1967, section 501 of the Rehabilitation Act of 1973, and sections 102-104 of the Americans with Disabilities Act of 1990. Inasmuch as this Board' s authority is limited to determining whether a violation within the meaning of section 302 of GERA has occurred, and that section does not include constitutional prohibitions, this Board is unable to address the parties constitutional claims.

ORDER

In accordance with this Opinion, it is Ordered that: Respondent's Motion for Summary Judgment is GRANTED and on this ___ day of December, 1993 the above referenced case DISMISSED.

_____

Irving N. Tranen, Hearing Board Chairman.

_____

Allan S. Danoff, Hearing Board Member

_____

Roger Kaplan, Hearing Board Member

GERA:

Title 2

§ 1201. Government employee rights

(a) Short title

This chapter may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose

The purpose of this chapter is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) Definitions

For purposes of this chapter:

(1) Senate employee

The term "Senate employee" or "employee" means--

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose

claim of a violation arises out of the individual's Senate employment.

(2) Head of employing office

The term "head of employing office" means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) Violation

The term "violation" means a practice that violates section 1202 of this title.

§ 1202. Discriminatory practice prohibited.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on-

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of Title 42;

(2) age, within the meaning of section 633a of Title 29; or

(3) handicap or disability, within the meaning of section 791 of Title 29 and section 12112 to 12114 of Title 42.

§ 1203. Establishment of Office of Senate Fair Employment Practices

(a) In general

There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this chapter as the "Office"), which shall--

(1) administer the processes set forth in sections 1205 through 1207 of this title;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) Director

(1) In general

The Office shall be headed by a Director (referred to in this chapter as the "Director") who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) Salary

The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the he same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) Annual budget

The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) Appointment of Director

The first Director shall be appointed and begin service within 90 days after November 21, 1991, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) Staff of the Office

(1) Appointment

The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this chapter.

(2) Detailees

The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members or personnel of the General Accounting Office Personnel Appeals Board.

(2) Consultants

In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 72a(i) of this title.

(d) Expenses of the Office

In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in

fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for--

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate.

The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this chapter. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) Rules of the Office

The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) Representation by the Senate Legal Counsel

For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

§ 1204. Senate procedure for consideration of alleged violations

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

(1) Step I, counseling as set forth in section 1205 of this title.

(2) Step II, mediation, as set forth in section 1026 of this title.

(3) Step III, formal complaint and hearing by a hearing board, as set forth in section 1207 of this title.

(4) Step IV, review of a hearing board decision, as set forth in section 1208 or 1209 of this title.

§ 1205. Step I: Counseling

(a) In general

A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 1203(b)(4) of this title.

(b) Period of counseling

The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) Employees of the Architect of the Capitol and Capitol Police

In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Bard for resolution of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this chapter.

§ 1206. Step II: Mediation

(a) In general

Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) Mediation period

The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

§ 1207. Step III: Formal complaint and hearing

(a) Formal complaint and request for hearing

Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 1205 and 1206 of this title.

(b) Hearing board

A board of 3 independent hearing officers (referred to in this chapter as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint any candidates who are recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) Dismissal of frivolous claims

Prior to a hearing under subsection (d) of this section, a hearing board may dismiss any claim that it finds to be frivolous.

(d) Hearing

A hearing shall be conducted--

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a) of this section, except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing and

(3) except as specifically provided in this chapter and to the greatest extend practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5.

(e) Discovery

Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) Subpoena

(1) Authorization

A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) Objections

If a witness refuses, on the basis of relevance, privilege, or other objections, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) Enforcement

The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select Committee on Ethics may consider appropriate with respect to--

(A) the failure or refusal to any person to appear in proceedings under this[1] or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section.

For purposes of section 1365 of Title 28, the office shall be deemed to be a committee of the Senate.

(g) Decision

The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) Remedies

If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 2000e-5(g) and (k) of Title 42, and may also order the award of such compensatory damages as would be appropriate if awarded under section 1981 and section 1981a(a) and (b)(2) of Title 42. In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 633a(c) of Title 29. Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

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1 SO in original. Probably should read "under this section."

(i) Precedent and interpretations

Hearing boards shall be guided by judicial decisions under statutes referred to in section 1202 of this title and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 1208 of this title, and other Senate precedents.

§ 1208. Review by the Select Committee on Ethics

(a) In general

An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee"), or such other entity as the Senate may designate, review a decision under section 1207 of this title, including any decision following a remand under subsection (c) of this section, by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) Review

Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) Remand

Within the time for a decision under subsection (d) of this section, the Committee may remand a decision no more

than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) Final decision

(1) Hearing board

If no timely request for review is filed under subsection (a) of this section, the Office shall enter as a final decision, the decision of the hearing board.

(2) Select Committee on Ethics

(A) If the Committee does not remand under subsection (c) of this section, it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a) of this section. The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if ;the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a) of this section, a decision of the hearing board, and notifies the interested parties of such decision.

(3) Entry of a final decision

The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 1209 of this title.

(e) Statement of reasons

Any decision of the Committee under subsection (c) of this section or subsection (d)(2)(A) of this section shall contain a written statement of the reasons for the Committee's decision.

§ 1209. Judicial review.

(a) In general

Any party aggrieved by a final decision entered pursuant to the provisions of section 1208(d)(2) of this title may petition for review by the United States Court of Appeals for the Federal Circuit. A decision may not be reviewed under this section unless a timely request for review of such decision was filed under section 1208(a) of this title.

(b) Law applicable

Chapter 158 of Title 28 shall apply to a review under this section except that--

(1) with respect to section 2344 of Title 28, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of Title 28, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 1208(d) of this title;

(4) the Office shall be an "agency" as that term is used in chapter 158 of Title 28; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) Standard of review

To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) Attorney's fees

If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 2000e-5(k) of title 42.

CPRA:

Title 5

§ 8335. Mandatory separation

(a) An air traffic controller shall be separated from the service on the last day of the month in which he becomes 56

years of age. The Secretary, under such regulations as he may prescribe, may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions of this subsection until that controller becomes 61 years of age. The Secretary shall notify the controller in writing of the date of separation at least 60 days before that date. Action to separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

(b) A firefighter who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which such firefighter becomes 55 years of age or completes 20 years of service if then over that age. A law enforcement officer who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which that officer becomes 57 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Commission, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The

employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Commission, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(d) A member of the Capitol Police who is otherwise eligible for immediate retirement under section 8336(m) shall be separated from the service on the last day of the month in which such member becomes 55 years of age or completes 20 years of service if then over that age. The Capitol Police Board, when in its judgment the public interest so requires, may exempt such a member from automatic separation under this subsection until that member becomes 60 years of age. The Board shall notify the member in writing of the date of separation at least 60 days in advance thereof. Action to separate the member is not effective, without the consent of

the member, until the last day of the month in which the 60-day notice expires.

(e) The President, by Executive order, may exempt an employee (other than a member of the Capitol Police) from automatic separation under this section when he determines the public interest so requires.

ADEA:

Title 29

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notifica

tion of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide

occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eight days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age

Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(2)

Supreme Court, U.S.
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No. 95-695

In the Supreme Court of the United States

October Term, 1995

KENNETH D. RIGGIN, *et al., Petitioners,*

v.

OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, *et al., Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF RESPONDENT OFFICE OF THE U.S. SENATE SERGEANT AT ARMS IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals properly held that the Government Employee Rights Act of 1991 did not implicitly repeal the Capitol Police Retirement Act.

II.

Whether the Court of Appeals properly exercised its jurisdiction to consider and to reject Petitioners' constitutional claim.

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No. 95-695

In the Supreme Court of the United States

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KENNETH D. RIGGIN, *et al., Petitioners,*

v.

OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, *et al., Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF RESPONDENT OFFICE OF THE U.S. SENATE SERGEANT AT ARMS IN OPPOSITION

Respondent Office of the United States Senate Sergeant At Arms (the "SAA") submits this brief in opposition to the Petition for Writ Of Certiorari filed by Kenneth D. Riggin and nine other retired officers of the United States Capitol Police ("USCP").

COUNTER-STATEMENT OF THE CASE

In 1990, Congress enacted the Capitol Police Retirement Act ("CPRA"), Pub. L. No. 101-428 § 2(b)(1)(A),

104 Stat. 928 (1990), which aligned the retirement system of the USCP with the retirement systems of other federal law enforcement agencies. The CPRA amended 5 U.S.C. § 8335 which, since 1974, had subjected federal law enforcement officers, other than the Capitol Police, to minimum and maximum age limits. The CPRA, as enacted in 1990, required any Capitol Police officer who was at least 55 years of age and had completed 20 years of service to retire unless the Capitol Police Board granted the officer a special exemption from automatic separation because the public interest so required.[1]

Petitioners are former Capitol Police officers on the Senate payroll who were required to retire pursuant to the mandatory retirement provisions of the CPRA. Opposing their mandatory retirement, the officers filed a charge with the Office of Senate Fair Employment Practices, in accordance with the Government Employee Rights Act of 1991 (the "GERA"), 2 U.S.C. § 1201 (1991). The GERA provides, *inter alia*, that all employment actions affecting employees of Senate offices shall be taken free from any discrimination based on age, as defined by section 15 of the Age Discrimination in Employment Act of 1967, (the "ADEA"), 29 U.S.C. § 633a. USCP officers are employees of Respondent SAA, and thus they are entitled to the protections of the GERA. In their charges, Petitioners argued that the mandatory retirement provisions of the CPRA violated the age discrimination prohibitions of the GERA. Petitioners also claimed that their mandatory retirement

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[1] The effective date of the CPRA was postponed two years; it became effective in 1992. In 1994 the CPRA was amended to raise the mandatory retirement age to 57. *See* Pub. L. No. 103-283, § 307(a), 108 Stat. 1441-42 (1994) (codified as amended at 5 U.S.C. § 8335(d)).

violated the equal protection component of the Due Process Clause of the Fifth Amendment.

Petitioners' cases were consolidated and an independent hearing board was appointed to consider their complaints in accordance with section 307(b) of the GERA, 2 U.S.C. § 1207(b). On the first day of the hearing, the hearing board granted the SAA's motion for summary judgment and dismissed the Petitioners' claims. The hearing board determined that the CPRA does not violate the GERA. Further, the board found nothing to indicate that Congress intended in 1991 to repeal by implication the mandatory retirement provisions of the CPRA, which had been enacted one year earlier.[2] (A at 37) The hearing board also found that it lacked subject matter jurisdiction of Petitioners' constitutional claim. (A at 39)

Petitioners requested review of the hearing board's decision by the Senate Select Committee on Ethics ("Ethics Committee") pursuant to section 308 of the GERA, 2 U.S.C. § 1208. The Ethics Committee affirmed the hearing board's decision, finding that "the CPRA was not repealed by and does not violate the [GERA]." (A at 28)

Thereafter, Petitioners sought review of the Ethics Committee's decision by the Court of Appeals for the Federal Circuit pursuant to section 309 of the GERA, 2 U.S.C. § 1209. In the Court of Appeals, Petitioners renewed their claim that the mandatory retirement provisions of the CPRA violated the age discrimination prohibitions of the GERA. Petitioners also contended that the hearing board had jurisdiction of Petitioners' Fifth Amendment claim, and they

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[2] "A ___" refers to the Appendix to the Petition for Writ of Certiorari in the instant case.

sought remand on that claim. Finally, Petitioners argued that the Ethics Committee violated their due process rights by not providing a detailed written opinion.

In a unanimous opinion, the Federal Circuit rejected Petitioners' arguments and affirmed the decision below. *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995). In reconciling the GERA and the CPRA, the court applied well-established rules of statutory construction and carefully reviewed the legislative history and background of the GERA and the mandatory retirement provisions of the CPRA. The court found compelling legislative evidence that the GERA should not be read to override the mandatory retirement provisions of the CPRA. Accordingly, the court held that "the CPRA and the GERA can and should be read compatibly, that Congress did not intend the GERA to repeal the CPRA, and that the petitioners are subject to the CPRA's mandatory retirement provisions." *Id.* at 1569. The court found that the SAA correctly applied the mandatory retirement provisions to the officers. The court also held that, although the hearing board had jurisdiction to consider Petitioners' equal protection claim, the failure to do so did not require remand. In rejecting Petitioners' claim and denying remand, the court found that the issue was purely a question of law within the court's jurisdiction to "decide all relevant questions of law and interpret constitutional and statutory provisions." 61 F.3d at 1571 (citing 2 U.S.C. § 1209(c)). Moreover, the court found, the issue was straightforward and did not justify remand. 61 F.3d at 1571. Finally, the court rejected Petitioners' claim that the Ethics Committee violated Petitioners' due process rights by not providing a detailed written statement of its reasons for upholding the hearing board's decision. *Id.* The court held that the opinion of the Ethics Committee satisfied the requirements imposed by the

GERA, the Ethics Committee's rules, and the Due Process Clause. *Id.*

REASONS FOR DENYING THE WRIT

I. NO COMPELLING REASON E :ISTS TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Petitioners have presented no compelling reason, as required by Rule 10 of the Supreme Court Rules, to support their Petition for Writ of Certiorari. Petitioners do not contend, nor could they, that the decision below conflicts with the decision of another United States court of appeals or with relevant decisions of this Court. *See* Sup. Ct. R. 10(a)(c).

Petitioners contend, rather, that this Court should review the decision of the Federal Circuit because it misapplied the law in this case. Petitioners also imply that the decision below involves issues of federal law that have not been, but should be, decided by this Court.

As explained below, the Federal Circuit properly applied the law in this case, consistent with relevant decisions of this Court. Also, the decision below does not raise an important issue of federal law that has not been decided by this Court. There is no reason, compelling or otherwise, to grant the Petition for Writ of Certiorari in this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED WELL-ESTABLISHED PRECEDENT OF THIS COURT TO FIND THAT THE GERA DID NOT IMPLICITLY REPEAL THE MANDATORY RETIREMENT PROVISIONS OF THE CPRA.

Petitioners assert that the Federal Circuit erred in finding that the mandatory retirement provisions of the CPRA do not conflict with the GERA's prohibition of age discrimination. (Petition at 7)[3] In essence, Petitioners have renewed their contention that the GERA implicitly repealed the mandatory retirement provisions of the CPRA.

The Federal Circuit correctly applied controlling precedent of this Court in determining that the GERA did not implicitly repeal the mandatory retirement provisions of the CPRA. The court first noted that a cardinal rule of statutory construction is that repeals by implication are disfavored. *See, e.g., Traynor v. Turnage*, 485 U.S. 535, 547 (1988).

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[3] "Petition ___" refers to the Petition for Writ of Certiorari. Petitioners also contend that the mandatory retirement provisions of the CPRA violate the age discrimination provisions of the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. § 1301. (Petition at 8) However, as the Court of Appeals correctly noted, the GERA, and not the CAA, provides the exclusive remedy for age discrimination claims of Senate employees when such claims accrue before January 23, 1996, the effective date of most of the provisions of the CAA. See 2 U.S.C. §§ 1311(d), 1435(a)(1).

The court further stated that this Court has consistently held that when two statutes appear to conflict

> courts will endeavor to read them consistently and will not find a narrow statute "submerged by a later enacted statute covering a more generalized spectrum" unless the later statute "expressly contradict[s] the original act" or unless such construction "is absolutely necessary" in order for the later statute to have any meaning at all.

61 F.3d at 1566 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Relying on this precedent, the court found that the "task of reconciling" the GERA and the CPRA "is not a difficult one." *Id.* The court found that the GERA, which protects employees of Senate offices from employment discrimination in general, is more general than the mandatory retirement provisions of the CPRA, which addresses a specific issue, mandatory retirement, that applies to a limited number of employees of Senate offices. *Id.* Furthermore, the court found that the GERA and the CPRA could be easily reconciled because "the mandatory retirement provisions of the CPRA simply establish a narrow exception to the general rule, set forth in the GERA, that Senate employees are protected against age discrimination in employment." *Id.*

In so ruling, the court appropriately deferred to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), which provides a close analogy to this case. In *Morton*, this Court found that a specific statute, the Indian Reorganization Act, which provided employment preferences to a limited group, Native Americans, was not implicitly repealed by a

later-enacted more general statute, the Equal Employment Opportunity Act of 1972. This Court held that, "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51.

The Federal Circuit also carefully examined the legislative background of the GERA and the CPRA and determined that Congress has clearly indicated that it has not repealed the mandatory retirement provisions of the CPRA. The court found "compelling legislative evidence" of this: Congress twice amended the CPRA's mandatory retirement provisions after the enactment of the GERA, and on numerous other occasions subsequent to the enactment of the GERA Congress considered legislation relating to the CPRA's mandatory retirement provisions or otherwise acknowledged that such provisions are still in effect.[4] *Id.* at 1568-69.

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[4] *See* Pub. L. No. 103-283, § 307, 108 Stat. 1441-42 (amendment to CPRA to increase mandatory retirement age from 55 to 57); Pub. L. No. 102-397, § 202, 106 Stat. 1949, 1951 (1992) (authorization for lump-sum payments of accrued leave for Capitol Police officers facing mandatory retirement under the CPRA); H.R. 4910, 102d Cong., 2d Sess. (1992) (legislation introduced to extend effective date of the mandatory retirement provisions of the CPRA by three years); H.R. Rep. No. 314, 103d Cong., 1st Sess. 3 (1993) (House Committee report on bill to amend the ADEA which acknowledged that the Capitol Police were subject to mandatory retirement); S. 1984, 103d Cong., 2d Sess. (1994) (Senate bill introduced to repeal the mandatory retirement provisions of the CPRA); 140 Cong. Rec. S7045 (daily ed. June 16, 1994) (request by Senator Jeffords to bar use of funds to enforce mandatory retirement of Capitol Police).

Petitioners contend that the holding of the Federal Circuit "was made in the absence of any Congressional indication" that the CPRA establishes a narrow exception to the GERA. (Petition at 7) Petitioners imply that Congress has decided that all mandatory retirement schemes for law enforcement officers are incompatible with the ADEA because Congress allowed to expire an ADEA exemption that permitted compulsory retirement of state and local law enforcement officers. *Id.* Petitioners' argument is specious for two reasons. First, it ignores the finding of the Federal Circuit that compelling legislative evidence exists of Congress's intent that the mandatory retirement provisions of the CPRA are extant and must be read consistently with the GERA. 61 F.3d at 1568-69. Second, Petitioners' contention ignores that Congress has, for nearly 50 years, enacted legislation governing the retirement rights of federal law enforcement personnel that is entirely separate and distinct from the mandatory retirement provisions applicable to nonfederal law enforcement officers. As this Court recognized in *Johnson v. Mayor of Baltimore*, 472 U.S. 353 (1985), which involved an ADEA challenge to the mandatory retirement scheme of a local government, "Congress is not always required to treat federal and nonfederal employees in the same way." *Id.* at 365 n.10.

Petitioners also contend that the Federal Circuit did not properly address the issue of whether the CPRA satisfies the bona fide occupational qualification test ("BFOQ") of the ADEA. In fact, the court addressed the issue by holding that the mandatory retirement provisions of the CPRA establish a narrow exception to the age discrimination prohibitions of the ADEA incorporated into the GERA. 61 F.3d at 1566. Relying on *Johnson*, however, Petitioners argue that this Court has found that the federal mandatory retirement scheme is not an exception to the age discrimination prohibitions of

the ADEA. (Petition at 6) Petitioners misconstrue *Johnson*. At issue in *Johnson* was whether Congress's establishment of a mandatory retirement age of 55 for federal firefighters *a fortiori* established age as a BFOQ, within the meaning of the ADEA, for non-federal firefighters. The Court found that it did not because Congress has "uncontested authority to exempt federal employees from the requirements of federal regulatory statutes," such as the ADEA. 472 U.S. at 363-70 (1985). Thus, contrary to Petitioners' assertion, the Court in *Johnson* did *not* hold that the federal mandatory retirement statute is not an exception to the age prohibitions of the ADEA.[5] Finally, the Federal Circuit explained in the instant case, "it would make no sense to hold that the mandatory retirement schemes for other law enforcement officers can co-exist with the [ADEA], while the mandatory retirement scheme for the Capitol Police cannot." 61 F.3d at 1568.

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[5] Other courts also have unanimously found that schemes mandating age restrictions for federal employees can be read compatibly with the ADEA. *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984) (ADEA co-exists with mandatory retirement provisions for federal law enforcement officers); *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983) (same); *Palmer v. Ticcione*, 576 F.2d 459, 465 n.7 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (same); *Bowman v. United States Dep't of Justice*, 510 F. Supp. 1183, 1186 (E.D. Va.), *aff'd*, 679 F.2d 876 (4th Cir. 1981), *cert. denied*, 459 U.S. 1072 (1982) (same). *See also Stewart v. Smith*, 673 F.2d 485, 493 (D.C. Cir. 1982) (maximum hiring age limits for federal law enforcement officers are not subject to the ADEA's BFOQ test); *Francke v. United States Dep't of the Treasury*, 721 F. Supp. 47, 50 n.3 (S.D.N.Y. 1989) (same).

In summary, the Petition should be denied because the Federal Circuit correctly applied well-established precedent of this Court. Furthermore, contrary to Petitioners' assertions, this case does not present an issue unresolved by this Court in *Johnson*.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY EXERCISED ITS JURISDICTION TO CONSIDER AND TO REJECT PETITIONERS' CONSTITUTIONAL CLAIM.

Petitioners maintain that the Federal Circuit unnecessarily intruded on the prerogatives of Congress when it decided the merits of Petitioners' equal protection claim without letting the Ethics Committee consider the claim in the first instance. (Petition at 10) Petitioners' argument is belied by the fact that Congress expressly gave the Federal Circuit jurisdiction to "decide all relevant questions of law and interpret constitutional and statutory provisions" in reviewing GERA appeals. 2 U.S.C. § 1209(c). Furthermore, the Federal Circuit correctly stated that Petitioners' equal protection claim "is a straightforward and simple one that would not justify the time and effort involved in a remand." 61 F.3d at 1571. Because appellate courts have the authority to address such constitutional issues in the first instance, *see* 28 U.S.C. § 2106, the Federal Circuit did not err in not remanding the equal protection claim. Further, it would have been a waste of judicial and congressional resources for the court to have remanded Petitioners' constitutional claim only to have the parties return to the Federal Circuit at a later date to present an issue that the court has already decided.

Petitioners further contend that the doctrine announced by this Court in *Railroad Commission of Texas v. Pullman*,

312 U.S. 496 (1941), supports a finding that the Federal Circuit erred in ruling on Petitioners' constitutional claim rather than remanding it to the Ethics Committee. The *Pullman* abstention doctrine provides that in cases where there is an unsettled question of state law that may obviate the need to decide a federal constitutional question, a federal court should abstain until the state court has resolved the state question. *Id.* at 501-02. The doctrine reflects the desire to preserve harmonious federal-state relations by preventing an "unnecessary ruling by a federal court that is supplanted by a controlling decision of a state court." *Id.* at 500. Petitioners' attempt to invoke the *Pullman* abstention doctrine in this case is flawed in several respects. First, no authority suggests that *Pullman*-type abstention should be applied to preserve harmonious relationships between coordinate branches of the federal government rather than between federal and state courts. Second, even if *Pullman*-type abstention could be applied by analogy to coordinate branches of the federal government, the doctrine would not apply in this case. No unsettled questions of law existed for the hearing board or Ethics Committee to resolve in this case. *See City of Houston v. Hill*, 482 U.S. 451, 468 (1978) (Pullman-type abstention requires that there be "an unsettled question of state law"). As the Federal Circuit explained, no plausible basis exists for distinguishing the instant case from *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Vance v. Bradley*, 440 U.S. 93 (1979), in which this Court rejected equal protection challenges to state and federal mandatory retirement statutes. 61 F.3d at 1571. Finally, this Court has emphasized that "[abstention] from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention is particularly inappropriate when, as in this case, "the naked question" merely involves an issue of constitutional interpretation. *See*

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984). For this reason, the Federal Circuit properly held that Petitioners' equal protection claim did not justify remand. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (*Pullman*-type abstention is not warranted when litigation has been long-delayed).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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v.
OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The Capitol Police Retirement Act, enacted in 1990 and amended in 1994, requires members of the U.S. Capitol Police force to retire upon reaching a specified age provided they have sufficient years of service to qualify for a federal pension. Petitioners present two questions concerning this statute:

1. Whether Congress implicitly repealed this mandatory retirement provision by enacting the Government Employee Rights Act of 1991, which extends the Age Discrimination in Employment Act's general prohibition against age-based employment discrimination to Senate employees, a category that includes members of the Capitol Police force whose pay is disbursed by the Secretary of the Senate.

2. Whether the Court of Appeals erred by deciding Petitioners' claim that this mandatory retirement provision violates the equal protection component of the due process clause of the Fifth Amendment, rather than remanding this purely legal issue to the Senate Select Committee on Ethics, which pursuant to the Government Employee Rights Act of 1991 had reviewed a hearing board's disposition of Petitioners' statutory claim but had affirmed the board's decision that it lacked jurisdiction to address the merits of the constitutional claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95–695

KENNETH D. RIGGIN, ET AL., PETITIONERS,

v.

OFFICE OF SENATE

FAIR EMPLOYMENT PRACTICES, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Office of Senate Fair Employment Practices submits this brief in opposition to the petition for a writ of certiorari filed by Kenneth D. Riggin and nine other retired members of the United States Capitol Police.

STATEMENT OF THE CASE

This petition arises out of several claims filed by former Capitol Police officers challenging their involuntary retirement at age 55 pursuant to the Capitol Police Retirement Act ("CPRA"), *codified as amended at* 5 U.S.C. § 8335(d). Using the procedures of the Government Employee Rights Act of 1991 ("GERA"), *codified as amended at* 2 U.S.C. §§ 1201 *et seq.*, the officers filed their claims with the Office of Senate Fair Employment Practices ("OSFEP"). The officers asserted that Congress had implicitly repealed the CPRA's mandatory retirement provisions when, one year after enacting the CPRA, it enacted the GERA, which generally applies the Age Discrimination in Employment Act of 1967 ("ADEA") to Senate em-

ployees. The officers also asserted that the mandatory retirement requirement violates their constitutional right to equal protection of the laws. A hearing board empaneled under the GERA rejected their statutory claim and held that it lacked jurisdiction to consider their constitutional claim. The Senate Select Committee on Ethics, which hears GERA appeals, affirmed. Petitioners then initiated judicial review of the GERA proceedings by filing a petition in the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed on the statutory claim, and, reaching the merits of the constitutional claim, rejected Petitioners' equal protection challenge. This petition followed.

A. The Statutory Framework

1. The CPRA. The CPRA is one of several provisions in the federal civil service retirement laws establishing a mandatory retirement age for certain classes of federal public safety personnel, such as law enforcement officers, air traffic controllers, and firefighters. *See* 5 U.S.C. §8335(a)–(d). As initially enacted in 1990, the CPRA required members of the Capitol Police force eligible for a pension to retire at age 55, unless exempted by the Capitol Police Board. *See* Capitol Police Retirement Act, Pub. L. No. 101–428, §2(b)(1)(A), 104 Stat. 928 (1990). In 1994, Congress amended the CPRA to raise the mandatory retirement age for eligible members of the Capitol Police to 57. *See* Legislative Branch Appropriations Act, 1995, Pub. L. No. 103–283, §307(a), 108 Stat. 1423, 1441 (1994).

Early retirement provisions for federal public safety personnel trace back to 1947, when Congress passed legislation permitting certain FBI officers to retire with an enhanced pension at age 50. *See* Act of July 11, 1947, ch. 219, 61 Stat. 307. In 1948, Congress extended this voluntary early retirement provision to cover most other federal law enforcement personnel—but not the Capitol Police—provided they had rendered twenty years of service. *See* Act of July 2, 1948, ch. 807, 62 Stat. 1221. In 1972, Congress added a similar provision covering federal fire-

fighters. *See* Act of Aug. 14, 1972, Pub. L. No. 92–382, 86 Stat. 539.

Not until 1974, however, did Congress amend the civil service retirement statutes to require that these federal law enforcement personnel and firefighters accept early retirement. *See* Act of July 12, 1974, Pub. L. No. 93–350, 88 Stat. 355. That same year, Congress extended the ADEA's protections to cover most federal employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93–259, 88 Stat. 55, 74–75. Two years earlier, Congress had enacted a mandatory retirement provision for air traffic controllers. *See* Act of May 16, 1972, Pub. L. No. 92–297, 86 Stat. 141, 144.

In 1978, Congress left these specific mandatory retirement provisions intact when, as part of a law further amending the ADEA, it repealed a separate provision in the civil service retirement laws that had required most other federal employees to retire upon reaching age 70. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 189, 191; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 10–11 (1978) (*reprinted in* 1978 U.S.C.C.A.N. 532); *see also Johnson* v. *Mayor of Baltimore,* 472 U.S. 353, 367–68 (1985). Indeed, in the same statute, Congress created an additional mandatory retirement provision applicable to employees of the Alaska Railroad and to employees of what is now called the Panama Canal Commission. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95–256, 92 Stat. 189, 191. In 1990, Congress further expanded the mandatory retirement provisions by enacting the CPRA, thus applying to the Capitol Police a mandatory retirement system analogous to the system already applicable to other federal law enforcement personnel.

2. The GERA. Petitioners sought relief from the CPRA's mandatory retirement provisions under the GERA. Part of the Civil Rights Act of 1991, the GERA extended the protections of the principal federal employment discrimination laws to Senate employees:

> All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—
>
> (1) race, color, religion, sex, or national origin, within the meaning of [Title VII];
>
> (2) age, within the meaning of [the ADEA]; or
>
> (3) handicap or disability . . .

2 U.S.C. § 1202. Petitioners qualified as Senate employees within the meaning of the GERA because at the time of their retirement they were among those members of the Capitol Police force "whose pay is disbursed by the Secretary of the Senate." *Id.* § 1201(c)(1).

Prior to the GERA's enactment, a Senate rule already provided Senate employees with rights to be free from employment discrimination, but those rights were enforceable only by the Senate Select Committee on Ethics, not in federal court. *See* Senate Standing Rule XLII, *reprinted in Senate Manual,* S. Doc. No. 1, 101st Cong., 1st Sess. 78 (1989); S. Res. 534, 94th Cong., 2d Sess. (1976), *reprinted in Senate Manual, supra,* at 147–48. With the GERA's statutory rights came an entirely new enforcement procedure. First, the GERA created a new office within the Senate, the Office of Senate Fair Employment Practices (OSFEP). *See* 2 U.S.C. § 1203. OSFEP's statutory duties include providing counseling and mediation services to aggrieved employees and empaneling independent hearing boards to adjudicate formal complaints filed with the office. *See id.* §§ 1205–1207. The GERA further provides that an aggrieved employee may seek review of a hearing board's decision by the Senate Select Committee on Ethics, and then may petition for review of the final decision in the United States Court of Appeals for the Federal Circuit, designating OSFEP as the respondent. *See id.* §§ 1208–1209.

B. The Proceedings Below

In 1993, after exhausting the counseling and mediation stages required by the GERA, Petitioners filed formal complaints with OSFEP, alleging that the CPRA's man-

datory retirement provisions violated both the GERA and the equal protection component of the Due Process Clause of the Fifth Amendment. The hearing board concluded that the mandatory retirement provisions are an exception to the general age discrimination prohibition of the GERA, and that the board lacked jurisdiction to consider Petitioners' constitutional claim. Appendix to Petition (hereinafter "Pet. App.") at 38–39 (unpublished decision). The Senate Select Committee on Ethics affirmed the hearing board's decision. Pet. App. at 28 (unpublished decision). Petitioners then sought review in the Federal Circuit, arguing both that the GERA implicitly repealed the mandatory retirement provisions of the CPRA and that the hearing board erred in concluding that it lacked jurisdiction to consider Petitioners' Fifth Amendment claim.

In a unanimous opinion, the Federal Circuit affirmed the hearing board's statutory ruling. Pet. App. at 3–20 (61 F.3d 1563 (1995)). The panel first reviewed the legal principles applicable in resolving a claim that one statute has impliedly repealed another. After reciting the "familiar canon of statutory construction that repeals by implication are disfavored," *id.* at 6 (61 F.3d at 1566), the court explained that it would not find a narrow statute repealed by a subsequent more generalized statute "unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary' in order for the later statute to have any meaning at all." *Id.* (61 F.3d at 1566) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Applying these principles to this case, the Federal Circuit had no difficulty reconciling the CPRA and the GERA. The court wrote:

> Contrary to the petitioners' contention, the GERA is the more general statute and the CPRA is the more specific: the GERA extends employment discrimination statutes to Senate employees generally, while the mandatory retirement provisions of the CPRA speak to a specific employment issue as it affects a specific group of

> congressional employees. Thus, the mandatory retirement provisions of the CPRA simply establish a narrow exception to the general rule, set forth in the GERA, that Senate employees are protected against age discrimination in employment.

Id. (61 F.3d at 1566). The court reinforced this conclusion by describing the parallel relationships between the GERA and the CPRA, on theone hand, and the ADEA and the mandatory retirement schemes for other federal law enforcement personnel, on the other. *Id.* at 8–10 (61 F.3d at 1567–68). The court also noted that Congress' 1994 amendment of the CPRA to raise the mandatory retirement age from 55 to 57 "put to rest" any doubt that the CPRA's mandatory retirement provisions survived the GERA's enactment three years earlier. *Id.* at 10–11 (61 F.3d at 1568).

The Federal Circuit then turned to Petitioners' Fifth Amendment claim "that the mandatory retirement provisions of the CPRA violate the equal protection component of the Due Process Clause." *Id.* at 12 (61 F.3d at 1569). The court concluded that the hearing board had erred in holding that it lacked jurisdiction over this constitutional issue. *Id.* at 13–17 (61 F.3d at 1569–71). The court explained that the hearing board had jurisdiction over this issue for the narrow reason that it "bears directly on whether [Petitioners] have a valid statutory discrimination claim" under the GERA, because if the CPRA's mandatory provisions were unconstitutional, as Petitioners asserted, then the CPRA could not operate to preclude Petitioners' age discrimination claim under the GERA. *Id.* at 13 (61 F.3d at 1569).

However, the circuit court also concluded that it could readily dispose of this constitutional issue without remanding it to OSFEP, noting that "[t]he issue is purely a question of law, and it is within this court's jurisdiction, in reviewing GERA appeals, to 'decide all relevant questions of law and interpret constitutional and statutory provisions.'" *Id.* at 17 (61 F.3d at 1571) (quoting 2 U.S.C.

§ 1209(c)). In the interests of judicial economy, the court elected to do just that. Relying on *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (*per curiam*), and *Vance* v. *Bradley*, 440 U.S. 93 (1979), the court held that the CPRA's mandatory retirement provisions do not deny Petitioners their constitutional right to the equal protection of the laws. Pet. App. at 17–18 (61 F.3d at 1571). The court therefore affirmed the judgment of the hearing board.

C. The Congressional Accountability Act

Petitioners assert (*e.g.*, Petition (hereinafter "Pet.") at 4–5, 9, 13) that this case should interest the Court in part because its resolution bears upon the recently enacted Congressional Accountability Act of 1995, Pub. L. No. 104–1, 109 Stat. 1 ("Accountability Act"), *to be codified at* 2 U.S.C. §§ 1301 *et seq.* The Accountability Act will supersede the GERA, extending to both House and Senate employees the employment and workplace protections of eleven federal statutes, including the nondiscrimination protections that the GERA now extends only to Senate employees. Although the fair employment portions of the Accountability Act, including its age discrimination provisions, will take effect on January 23, 1996, the Act will not affect the instant matter, as a savings provision provides for the completion under the GERA of pending proceedings. *See id.* § 506, 109 Stat. 42, *to be codified at* 2 U.S.C. § 1435.

While the Accountability Act preserves the same substantive protections offered by the GERA, it also creates a process for resolving new employee claims that is wholly distinct from that established under the GERA. For example, under the GERA, the Senate Select Committee on Ethics heard appeals from OSFEP-appointed hearing boards. By contrast, under the Accountability Act no Senate (or House) committee or body will have any role in adjudicating or resolving claims under the Accountability Act. Instead, claimants asserting fair employment claims may elect to have their complaints heard either in federal

district court or by a hearing officer appointed by the Office of Compliance, a newly established independent body in the legislative branch. *See id.* §§ 301, 405, 408, 109 Stat. 24, 33, 37, *to be codified at* 2 U.S.C. §§ 1381, 1405, 1408. A hearing officer's determination may be reviewed in the first instance by the Board of Directors of the Office of Compliance, followed by review in the Federal Circuit, but never by a Senate committee. *See id.* §§ 406–407, 109 Stat. 35, *to be codified at* 2 U.S.C. §§ 1406–1407. A case brought in federal district court may be appealed to the appropriate circuit court.

REASONS FOR DENYING THE WRIT

The petition should be denied because it fails to raise any "compelling" federal question, Sup. Ct. Rule 10, worthy of this Court's attention. The decision below is in harmony with decisions of this Court and of other circuits, and it reflects a proper understanding of the relationship between the GERA and the CPRA. In addition, the Federal Circuit acted well within its discretion in disposing of Petitioners' constitutional claim without a remand.

I. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED LEGAL PRINCIPLES ESTABLISHED BY THIS COURT AND APPLIED BY OTHER COURTS TO SIMILAR ISSUES.

For guidance in addressing Petitioners' claim that the GERA implicitly repealed the CPRA, the Federal Circuit looked to this Court's pronouncements that repeals by implication are disfavored and should be avoided if the statutes can be reconciled. *See* Pet. App. at 6 (61 F.3d at 1566) (citing *Traynor* v. *Turnage*, 485 U.S. 535, 547 (1988); *Radzanower*, 426 U.S. at 154; *Morton* v. *Mancari*, 417 U.S. 535, 549–50 (1974)). The court's conclusion that the narrower CPRA survived enactment of the more general GERA thus involves unremarkable legal principles, and Petitioners do not argue to the contrary.

Rather, Petitioners contend that in reaching this conclusion the Federal Circuit misapplied these settled legal principles. Yet other courts addressing the parallel issue

of the relationship between other federal mandatory retirement requirements and the ADEA's age discrimination prohibitions have analogously reasoned that the ADEA did not invalidate the federal retirement provisions. *See, e.g., Palmer* v. *Ticcione,* 576 F.2d 459, 465 n.7 (2d Cir. 1978) (state retirement law at issue), *cert. denied,* 440 U.S. 945 (1979); *Bowman* v. *Department of Justice,* 510 F. Supp. 1183, 1186 (E.D. Va. 1981), *aff'd,* 679 F.2d 876 (4th Cir.) (table), *cert. denied,* 459 U.S. 1072 (1982); *Bradley* v. *Kissinger,* 418 F. Supp. 64, 68–69 (D.D.C. 1976) (suggesting in dictum that ADEA did not supersede mandatory retirement provision). Indeed, the Federal Circuit expressly relied upon these decisions in reaching its conclusion. *See* Pet. App. at 8 (61 F.3d at 1567). Although Petitioners attempt to disparage these decisions as "old" (Pet. at 6), the analysis in these decisions remains sound. Petitioners have not identified any decisions suggesting that the Federal Circuit's interpretation of the impact of the ADEA on federal mandatory retirement departs from other circuits' interpretations of the relationship of these laws.

Instead, Petitioners argue that this Court in *Johnson* v. *Mayor of Baltimore,* 472 U.S. 353 (1985), left open the question of "the compatibility of the federal mandatory retirement statute with the ADEA." Pet. at 6. Petitioners also claim that "this Court clearly indicated in *Johnson* that the federal mandatory retirement scheme was *not* an exception to the ADEA." *Id.* In fact, however, in *Johnson* this Court made clear that the federal mandatory retirement statutes *were* an exception to Congress' 1978 extension of the ADEA to federal employees. *See* 472 U.S. at 366–70. The Court simply did not question the continuing validity of these provisions.

At issue in *Johnson* was whether Congress' establishment of a mandatory retirement age of 55 for most federal firefighters rendered age a bona fide occupational qualification ("BFOQ"), within the meaning of the ADEA, for non-federal firefighters. The Court concluded that the federal civil service retirement provisions did not estab-

lish a BFOQ, because "factors other than conclusive determinations of occupational qualifications" likely led Congress to enact these provisions. *Id.* at 369–70. But in so finding, the Court expressly acknowledged the existence of "[t]he myriad political purposes" that could "properly" have led Congress to make mandatory retirement for public safety personnel a part of the federal civil service retirement program. *Id.* at 370. The Court also recognized Congress' "uncontested authority to exempt federal employees from the requirements of federal regulatory statutes," *id.*, and summarized the legislative history showing that Congress, when it amended the ADEA in 1978 to make it otherwise generally applicable to federal employees, created just such an exemption by deliberately retaining the mandatory retirement provisions for federal firefighters, law enforcement personnel, and air traffic controllers, *id.* at 367–68 & n.11.

Although the Court in *Johnson* acknowledged the possibility that these federal mandatory retirement provisions might not be consistent with the spirit of the ADEA, *see id.* at 366, the Court also acknowledged Congress' legislative discretion to adopt either more restrictive or more protective legislation for federal employees, *see id.* at 366 n.10. In short, the only issue "left open" in *Johnson* was whether at some future time Congress might ultimately decide to enact statutory amendments to eliminate any of the federal mandatory retirement provisions that Congress had intentionally preserved in 1978 as exceptions to the ADEA. *See id.* at 367–68 & n.11. The Court rightly saw this as a purely legislative decision.

Accordingly, the instant case presents neither a question of law that the *Johnson* decision left unresolved nor a split among the circuits. This Court soundly declines to exercise its certiorari authority where there is "no conflict of decision within the federal system." *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

II. The Federal Circuit Properly Determined That the CPRA's Specific Mandatory Retirement Provisions Were Not Repealed by the GERA's General Prohibition Against Age Discrimination in Senate Employment.

Several years after *Johnson*, Congress enacted the Capitol Police Retirement Act of 1990, thereby extending the principle of mandatory retirement of federal law enforcement personnel to the Capitol Police. At the time, the ADEA did not apply to Senate employees. In 1991, Congress made the ADEA's substantive protections against age discrimination applicable to all Senate employees, including those members of the Capitol Police on the Senate payroll, by enacting the GERA. Petitioners unsuccessfully argued to the hearing board and the Federal Circuit that with this action Congress impliedly repealed the CPRA. Petitioners now raise this argument before this Court (Pet. at 5), relying primarily on portions of the GERA's legislative history in which individual Senators stated generally that the GERA's protections would apply to all Senate employees.

The Federal Circuit concluded that it could readily reconcile the GERA's general protection of Senate employees from a variety of forms of employment discrimination with the CPRA's specific mandatory retirement provisions applicable to members of the Capitol Police. In addition to the principle that repeals by implication are not favored, the court relied on the principle that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of [the] priority of enactment." Pet. App. at 7 (61 F.3d at 1566) (quoting *Morton* v. *Mancari*, 417 U.S. at 550–51). The court explained that the CPRA merely "brought the retirement system for the Capitol Police into line with the retirement systems for other federal law enforcement agencies," *id.* at 8 (61 F.3d at 1567), and added:

> [J]ust as the ADEA does not conflict with or invalidate the mandatory retirement provisions applicable to other federal law enforcement officers, the GERA does not conflict with or invalidate the mandatory retirement provisions of the CPRA.

Id. at 9 (61 F.3d at 1567). The court thus found neither that it was "absolutely necessary" to view the GERA as repealing the CPRA in order for the GERA to have meaning, nor that the two statutes "expressly contradict" each other, as is required to find an implied repeal. *Id.* at 6 (61 F.3d at 1566).

Contrary to Petitioners' claim (Pet. at 5), the Federal Circuit's decision has not "thwarted Congress' will" that the GERA apply universally to all Senate employees. As the Federal Circuit explained, the legislative history Petitioners rely upon shows only that it was Congress' will that the GERA's protections apply to the Senate's legislative employees, as well as to its non-legislative employees. Pet. App. at 11 (61 F.3d at 1568). As the court noted, Congress' legislative enactments since the GERA are probative of Congress' intent that the CPRA remain effective after enactment of the GERA: In 1992 Congress amended the CPRA to authorize certain lump-sum payments of accrued leave to Capitol Police officers facing mandatory retirement under the law, and in 1994 Congress amended the CPRA again to raise the mandatory retirement age for Capitol Police from 55 to 57. *See id.* at 10 (61 F.3d at 1568). These post-GERA amendments to the CPRA "make it plain that Congress did not regard those provisions as repealed by the GERA." *Id.* at 12 (61 F.3d at 1569).

Petitioners also note that, in response to this Court's decision in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), Congress enacted (and eventually permitted to lapse) an exemption from the ADEA for the mandatory retirement schemes of state and local law enforcement agencies. Pet. at 7. But contrary to Petitioners' suggestion, Congress was not required to enact an analogous exemption in order to preserve the federal mandatory retirement provisions, given Congress' obvious intent that these other fed-

eral statutes remain valid. As discussed above (pp. 9–10), this Court in *Johnson* has already recognized this intent.

In short, the Federal Circuit properly concluded as a simple matter of statutory construction that Congress had not repealed the CPRA. The CPRA and the GERA can and should be harmonized, just as this Court in *Johnson* harmonized the other federal mandatory retirement provisions and the ADEA. This case thus presents no compelling federal question regarding the relationship of the CPRA and the GERA worthy of review on writ of certiorari. *See* Sup. Ct. Rule 10.

III. The Federal Circuit Did Not Err in Disposing of Petitioners' Constitutional Claim Without a Remand.

As an independent basis for seeking a writ of certiorari, Petitioners argue that, once the Federal Circuit concluded that the hearing board had jurisdiction over Petitioners' Fifth Amendment claim that the CPRA abrogated their due process right to the equal protection of the laws, then, in deference to the legislative branch and as a matter of "constitutional comity," the court should have remanded that claim to the Senate Select Committee on Ethics. Pet. at 9. (The GERA does not prescribe whether the Committee, the OSFEP hearing board, or OSFEP itself is to receive remands from the Federal Circuit. Although in the ordinary course OSFEP, as the respondent, would receive and dispose of any remand by returning the matter to the hearing board or the Committee as appropriate under the statute, this brief adopts Petitioners' formulation of the issue.) Petitioners suggest that a remand would have furthered the legislative branch's prerogative "to determine matters related [to] its own internal governance." *Id.*

The Federal Circuit's decision to dispose of Petitioners' equal protection claim without a remand to the Senate Select Committee on Ethics was not error. Appellate courts assuredly have the discretion to remand constitutional issues when additional factual development or legal

argument is likely to clarify the precise contours of such issues or to eliminate the need to reach them. However, appellate courts also always retain plenary authority to adjudicate constitutional questions squarely presented. *See* 28 U.S.C. §2106; *Haynes* v. *United States*, 390 U.S. 85, 101 (1968). Because appellate courts are properly concerned with judicial economy, when facing a purely legal issue they may soundly conclude, as the Federal Circuit did in this case, that "the time and effort involved in a remand" are not justified. Pet. App. at 17 (61 F.3d at 1571).

This is especially so when, as here, the issue is "straightforward and simple," *id.* at 17 (61 F.3d at 1571), and similar questions have been previously adjudicated. *See Haynes*, 390 U.S. at 101 (describing a remand as "an entirely needless additional proceeding" when outcome is "inevitably" foreordained). As the Federal Circuit noted, in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (*per curiam*), this Court held that a mandatory retirement requirement for state police officers did not deny them equal protection because the requirement had a rational basis. *Id.* at 314–17. Later, in *Vance* v. *Bradley*, 440 U.S. 93 (1979), the Court similarly held that Congress' imposition of a mandatory retirement age of 60 on federal employees in the Foreign Service retirement system did not deny them equal protection, even though federal employees in the Civil Service retirement system did not face mandatory retirement until age 70, or faced no mandatory retirement at all. *Id.* at 98–112. Relying on these precedents, the Federal Circuit readily and correctly resolved the equal protection issue in this case. Indeed, Petitioners have not challenged the correctness of the merits of this decision. Any error in not remanding this issue therefore would be harmless.

Nonetheless, Petitioners argue that the Federal Circuit should have deferred ruling on the constitutional issue until after the Senate Select Committee on Ethics had considered it. Invoking *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), Petitioners suggest

that something akin to *Pullman* abstention is also justified in this case. Yet in *Pullman,* the controversy involved state law issues that had the potential of obviating the need to resolve the constitutional issue. Here, by contrast, a remand to the Senate Select Committee on Ethics would not have avoided the constitutional issue, but instead would have placed before the Committee the identical constitutional issue that was before the Federal Circuit.

Petitioners also assert that the record was not yet sufficiently developed for the Federal Circuit properly to address the equal protection issue. Petitioners do not explain why additional development of "the precise nature of the due process claims" (Pet. at 9) was needed, but their argument suggests that they desire to challenge the "internal operations" (Pet. at 12) and "policies" (Pet. at 13) by which Congress has implemented the GERA. Yet the Federal Circuit did not hold that the hearing board (and derivatively the Federal Circuit) had jurisdiction over this type of free-standing due process claim. Instead, the court held only that the hearing board had jurisdiction over the limited issue of whether the CPRA violated Petitioners' Fifth Amendment rights to equal protection. This was the only constitutional issue the hearing board had jurisdiction to hear because only this issue had the potential of affecting the merits of Petitioners' GERA-based age-discrimination claim.

Accordingly, regardless of whether under the GERA Congress has, as Petitioners claim, "reserved fact finding and initial determinations for itself," Pet. at 11, the constitutional issue before the Federal Circuit in this case raised a pure question of law that did not implicate the prerogatives of the legislative branch "to govern its own practices and procedures," *id.* This issue instead was ripe for the court's immediate resolution. As the Federal Circuit noted, under the GERA Congress authorized the Federal Circuit to "'decide all relevant questions of law and interpret constitutional and statutory provisions.'" Pet. App. at 17 (61 F.3d at 1571) (quoting 2 U.S.C. § 1209(c)).

Congress' interests simply were not injured by the Federal Circuit's reliance on this authority to reject Petitioners' constitutional claim. Indeed, the alternative in this case would have been a lingering controversy needlessly burdening both the legislative and judicial branches.

To the extent Petitioners maintain that they should have been able to bring some other due process issue before the hearing board, even to this Court they have not articulated "the precise nature" of this claim. Litigants have the burden of articulating their claims with sufficient specificity, and in the absence of such specificity they may not be heard to complain of error regarding how a court has adjudicated those claims. *Cf. Wimm* v. *Jack Eckerd Corp.*, 3 F.3d 137, 142 (5th Cir. 1993) (rejecting appellants' claim that district court decided wrong issue, because appellants did not raise alternative formulation of issue until their second amended complaint, which district court had not permitted to be filed).

In any event, Petitioners' argument that the Federal Circuit erred in not remanding their due process claim to the Senate Select Committee on Ethics simply does not raise a compelling issue worthy of granting a writ of certiorari. Contrary to Petitioners' suggestion (Pet. at 9), once the Accountability Act takes effect next month, the considerations of "constitutional comity" that they posit will become moot, for as described above (pp. 7–8), under the new statute no committee of Congress will have any procedural role in adjudicating employment claims of congressional employees. Instead, these claims will be heard in the first instance either by a hearing officer appointed by the independent Office of Compliance, or in federal district court, and neither the Senate Select Committee on Ethics nor any other congressional committee will take any part in reviewing decisions before they are appealable to the Federal Circuit. Therefore this case at most raises an issue unique to the GERA, a soon-to-be superseded statute, and the writ should be denied. This Court properly declines to exercise its certiorari powers and to expend its resources to resolve issues involving statutory

schemes that have been superseded. *See, e.g., Triangle Improvement Council* v. *Ritchie,* 402 U.S. 497, 498–501 (1971) (Harlan, J., concurring in dismissal of writ of certiorari as improvidently granted); *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73–77 (1955).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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